

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

**BARTLE BOGLE HEGARTY, INC.**

**and**

**Case 02-CA-220370**

**SCREEN ACTORS GUILD- AMERICAN  
FEDERATION OF TELEVISION  
AND RADIO ARTISTS**

**COUNSEL FOR THE GENERAL COUNSEL'S  
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

Dated at New York, New York  
This 12th Day of April 2019

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## I. STATEMENT OF THE CASE

Acting on an unfair-labor-practice charge filed by Screen Actors Guild-American Federation of Television and Radio Artists (herein SAG-AFTRA or Union), the Regional Director for Region 2 of the Board issued a complaint alleging that Bartle Bogle Hegarty, Inc. (herein BBH or Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (herein the Act) by withdrawing recognition from the Union as the bargaining representative of its unit employees.<sup>1</sup> Respondent filed an answer admitting that it withdrew recognition, but denying that its withdrawal was unlawful.<sup>2</sup> On January 18, 2019, the Regional Director amended the Complaint and Notice of Hearing to add a remedial paragraph.<sup>3</sup> (GX-1(l)).

A hearing before Administrative Law Judge Kenneth W. Chu was held on February 6, 2019. The record was held open to allow documents responsive to the General Counsel-issued subpoena to be entered into the record as joint exhibits. Administrative Law Judge Chu admitted the joint exhibits into the record and closed the record on March 12, 2019.

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<sup>1</sup> The Charge was filed on May 14, 2018 and served on May 17, 2018. (GX-1(a) and (b.)) The Complaint issued on August 31, 2018. (GX-1(c)). References in this brief are to the original record. “Tr.” refers to the transcript, “JT” refers to the parties’ joint exhibits from the hearing before the administrative law judge, and “GX” and “RX” refer respectively to the General Counsel’s and Respondent’s exhibits from that hearing.

<sup>2</sup> GX-1(i).

<sup>3</sup> GX-1(l). General Counsel seeks an Order requiring Respondent to recognize and bargain with the Union; notify the Union, in writing, of any changes made to Unit employees’ wages, hours, and other terms and conditions of employment subsequent to November 21, 2017; upon request of the Union, rescind any such changes; and make all affected Unit employees whole for any losses they incurred by virtue of these changes in their wages, hours, and other terms and conditions of employment, including all contractually required contributions to the Union’s benefit funds, after November 21, 2017. *Id.*

**II. ISSUES PRESENTED**

- Whether Respondent unlawfully withdrew recognition of the Union as the collective bargaining representative of its employees?
- Whether Respondent has refused to bargain with the Union?

### III. STATEMENT OF FACTS

#### A. *HISTORY OF THE INDUSTRY AND THE PARTIES*

Respondent, a New York State corporation with an office and place of business located at 32 Avenue of the Americas, New York, New York, has operated a creative advertisement agency since 1988. (JT-1(1).) There is no dispute that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.<sup>4</sup> BBH employs actors for the commercials it produces for its clients and has hired these employees on a production by production basis since 2000. (JT-1(3)).

The Union is a labor organization within the meaning of Section 2(5) of the Act and represents more than 160,000 actors, broadcasters, recording artists, and other media professionals.<sup>5</sup> (JT-1(5)).

The Joint Policy Committee (herein “JPC”) is a multi-employer bargaining association composed of the Association of National Advertisers-American Association of Advertising Agencies (herein “ANA-4As”). (JT-1(5)). Through the ANA-4As, about 200 advertising agencies and about 100 advertisers, or fewer, have authorized the JPC to act as their bargaining representative. (Tr. 86).

The Union negotiates multi-employer agreements in the commercial industry with the JPC. *Id.* The JPC and the Union have been in a mutually beneficial bargaining relationship since 1955. (Tr. 92).

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<sup>4</sup> In its answer to the Complaint, the Respondent admits jurisdiction. Compare GX-1(c) with GX-1(i).

<sup>5</sup> In its answer to the Complaint, the Respondent admits labor organization status. Compare GX-1(c) with GX-1(i). The Screen Actors Guild (“SAG”) and the American Federation of TV and Radio Artists (“AFTRA”) merged in 2012 to form the Screen Actors Guild-American Federation of TV and Radio Artists (“SAG-AFTRA”). (JX-1(13)). Prior to 2012, AFTRA negotiated the Radio Recorded Commercials Contracts and SAG negotiated the Commercials Contracts.

The JPC and the Union negotiate two contracts relevant here with the JPC: The Commercials Contracts and the Radio Recorded Commercials Contracts (herein known collectively as the "Commercial Contracts"). The Commercial Contracts provide that the Union is recognized as the exclusive bargaining agent of the described units. (JT-2(E) pg. 2; JT-2(Q); JT-2(L) pg. 2; JT-2(T)). Additionally, union security clauses are present in the Commercial Contracts, which were approved by an advisory opinion of the NLRB's General Counsel. (JT-2(E) pg. 104; JT-2(Q); JT-2(L) pg. 27; JT-2(T)). The clauses require unit membership as a condition of employment after the 30<sup>th</sup> day of initial employment. (JT-2(E) pg. 103; JT-2(Q); JT-2(L) pg. 26; JT-2(T)).

There are also agencies or advertisers, not members of the JPC, who sign independent agreements with the Union with the same terms as the Commercial Contracts. (Tr. 86). The Union estimates there to be about 200 of these entities, known as direct signatories. (Tr. 86, 92). After the Union and the JPC reach agreement on new Commercial Contracts, the Union sends each direct signatory copies of the new agreement and a "Letter of Adherence". The direct signatory may execute the Letter of Adherence, which binds it to the terms of the Commercial Contracts or bargain an agreement. (JT-1(12); JT-2(Q), Tr. 87-88).

### **B. *THE BARGAINING RELATIONSHIP***

BBH began its longstanding relationship with Union on September 28, 1999, when BBH recognized the AFTRA as the exclusive collective bargaining representative of the Radio Commercials Unit.<sup>6</sup> (JT-1(10)). The next year on November 16, 2000, BBH recognized the SAG

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<sup>6</sup> At all material times, the Radio Recorded Commercials Contract has defined the following unit of BBH's employees (the Radio Recorded Commercials Unit) as a unit appropriate for the purposes of collective bargaining:

All actors, singers, announcers, and sound effects persons employed in the production of commercials made for use on the Internet or New Media for commercial sound recordings (including audio tape, wire recording, sound

as the exclusive collective bargaining representative of the Commercials Unit.<sup>7</sup> (JT-1(8)). Thus, the Union represents the two bargaining units. BBH has always been a direct signatory, signing Letters of Adherence. (JT-1(12); JT-2(N-T)). BBH has never sought to bargain separate terms with the Union. (JT-1(13)).

The most recent collective bargaining agreements for the two units were effective by their terms from April 1, 2013 to March 31, 2016 (herein the 2013 Commercial Contracts). BBH Senior Business Manager Sean McGee<sup>8</sup> signed Letters of Adherence for the 2013 Commercial Contracts on November 18, 2013. (JT-1(14); JT-2(E, L, Q, T)). While the agreements expired by their terms on March 31, 2016, BBH maintained the status quo and terms of those expired agreements until November 21, 2017, when it abruptly withdrew recognition and refused to bargain. (JT-1(20); JT-2(Z)).

### ***C. BARTLE BOGLE HEGARTY'S REFUSAL TO BARGAIN***

The Union's National Director Lori Hunt sent out the 2016 Commercial Contracts<sup>9</sup> along with the letters of adherence to BBH and all other past signatories, on June 17, 2016, and again on

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tracks), as defined in the collective bargaining agreement, and any other similar devices and others means for audio reproduction for radio or television broadcasting purposes only. (JT-1(9); JT-2(G-M)).

<sup>7</sup> At all material times, the Commercials Contract has defined the following unit of BBH's employees (the Commercials Unit) as a unit appropriate for the purposes of collective bargaining:

All principal performers (including actors, singers, announcers, narrators, specialty dancers, specialty acts, puppeteers, stunt performers, and pilots) and all extra performers employed in the production of commercials, as defined in the Collective Bargaining Agreement.

(JT-1(7); JT-2(A-F)).

<sup>8</sup> Senior Business Manager Sean McGee is no longer employed with BBH. McGee was employed from May 2, 2013 until December 3, 2016. During his tenure, McGee had the authority to speak and act on behalf of BBH. (JT-1(4)).

<sup>9</sup> Prior to Commercial Contracts expiration on March 31, 2016, Hunt sent out a 60-day notice on January 28, 2016. (JT-1(15); JT-2(U)). On April 3, 2016, the Union and the JPC executed a memorandum agreeing to terms for successor contracts. (JT-1(15)).

August 11, 2016. (JT-1(16); JT-2(V, W)). Hunt sent out the second letter to all signatories who had not yet signed a letter of adherence or reached out to bargain. (JT-1(16)). Even though BBH received both letters, BBH did not sign the letters of adherence nor did they ever request to bargain. (JT-1(16)).

During the month of November 2016, the Union reached out several times to BBH inquiring about signing the letters of adherence. On November 3, 2016, Union Business Representative Angelica Criscuolo sent the first inquiry email. (JT-1(17); JT-2(X)). Four days later, on November 7, 2016, Criscuolo sent a follow-up email to BBH. That same day, McGee responded by email that he was looking into Criscuolo's request. (JT-1(18); JT-2(X)). Having heard no further response from BBH, on November 30, 2016, Union Business Agent James Alvarado sent another email to McGee asking for any updates. (JT-1(19); JT-2(Y)).

On November 21, 2017, Chief Financial Officer Nikita Malhorta, acting on behalf of BBH, sent Hunt a letter repudiating the 2013 Commercial Contracts and any obligations to bargain successor agreements. (JT-1(20); JT-2(Z)). Union Assistant General Counsel David Gregoire responded to the Malhorta's letter with a demand for bargaining letter on December 20, 2017. (JT-1(21); JT-2(AA)). On January 8, 2018, BBH's Legal Counsel Gregory Hessinger responded via email to the demand by contending that BBH had a right to repudiate the contracts because it did not maintain a permanent bargaining unit and the contracts were illegal pre-hire contracts. (JT-1(22); JT-2(BB)).

On April 19, 2018, after learning that BBH was producing a commercial that featured a live bear, Union Director Tracy Hyman sent an email to BBH's Director of Business Affairs Librado Sanchez. (JT-1(23); JT-2(CC)). Hyman requested that BBH bargain to ensure that all necessary precautions were being taken to protect the actors. (*Id.*). Sanchez's response email stated

that the commercial was non-union. (*Id.*). On April 23, 2017, Hyman responded that BBH was still bound to the Commercial Contracts. (*Id.*).

#### D. *EMPLOYMENT STATISTICS*

Pursuant to the CBAs and ERISA<sup>10</sup>, all employers must file a report with the Union benefit plans when remitting payments to performers who perform unit work. (Tr. 31-32; JT-2(E), pgs. 179, 181-83). The reports are used to determine benefit plan contributions. (Tr. 32). While the benefit plans receive this information or data on a continuous basis, they submit the data to the Union on a weekly basis. (*Id.*). The Union keeps this data in an Oracle database and uses it to analyze how often unit-members are working and the amount of money they are earning. (Tr. 33).

Chief Economist David Viviano has worked at the Union since 2012. (Tr. 29). In anticipation of litigation, using the data the Union received from the benefit plans, Viviano created a spreadsheet, which lists all instances of work performed for the signatory BBH under the Commercial Contracts.<sup>11</sup> (Tr. 35; GX-3). The spreadsheet lists all individual payments to individual performers from 2001 through 2018. (Tr. 34). Since the underlying data only reflects the first date of a production, the spreadsheet does not inform which or how many performers worked multiple days on a production. (Tr. 36). Multiple day production information was furnished through BBH's records. According BBH's records, 57 performers worked multiple days in 2016, and 41 performers worked multiple days in 2017, the year of the repudiation. (JT-5(A)). The evidence Respondent produced pursuant to subpoena also shows that BBH employed 152 performers in 2016 and 102 performers in 2017. (*Id.*). Additionally, the evidence produced by Respondent shows that multiple performers worked for BBH on more than one commercial on

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<sup>10</sup> ERISA is the Employee Retirement Income Security Act of 1974. The United States Department of Labor is tasked with the implementation and administration of ERISA.

<sup>11</sup> Records for BBH Limited, the London-based firm, were excluded from all these records. (Tr. 44).

more than one date in 2016, 2017, and even in 2018. (*Id.*). In 2016, six performers worked on different commercials on different days; in 2017, there were two performers; and in 2018 there were four performers. (*Id.*). From 2016 through 2018, Union member performers made up a staggering majority of the performers employed by BBH: 94.1% in 2016, 93.8% in 2017, and 92.5% in 2018. (GC-3). In fact, Union members have made up a majority of all performers employed by BBH since 2001. (*Id.*).

#### **IV. ARGUMENT**

Respondent unlawfully withdrew recognition from SAG-AFTRA and then refused to bargain in violation of Section 8(a)(5) of the Act. 29 U.S.C. § 158(a)(5). The facts are not in dispute. BBH voluntarily recognized the Union as the collective bargaining representative of its employees and engaged in a mutually beneficial bargaining relationship with the Union that lasted almost 20 years. At the expiration of the 2013 Commercial Contracts on March 31, 2016, BBH had the duty to bargain over the terms of a successor contract or sign the letters of adherence. BBH instead maintained the status quo until November 21, 2017 when it, by letter, repudiated the terms of the Commercial Contracts and then refused the Union's subsequent requests to bargain - a text book violation of the Act.

As affirmative defenses, Respondent asserts that it was well within its rights to withdraw recognition for two reasons: (1) the Commercial Contracts are illegal pre-hire contracts and (2) it no longer maintained a permanent bargaining unit. These affirmative defenses are without merit because Respondent is time barred from raising questions of the Union's majority support or the appropriateness of the bargaining units at the time of recognition. However, assuming *arguendo* Respondent has not waived its rights from asserting these defenses, the defenses still fail because there is no evidence of a lack of majority support at the time of recognition; and the bargaining

units are composed of temporary or intermittent workers, which are lawful and appropriate units. Therefore, Respondent unlawfully withdrew recognition from the Union and unlawfully refused to bargain with the Union and violated Sections 8(a)(5) and (1) of the Act.

***A. Respondent recognized the Union as the exclusive collective bargaining representative of its employees under Section 9(a) of the Act***

Almost 20 years ago, BBH voluntarily recognized first AFTRA and then SAG as the collective bargaining representative for employees in the Commercials Unit and Radio Recorded Commercials Unit. It is well settled that a union may attain the status of the employees' Section 9(a) collective-bargaining representative through voluntary recognition by the employer. The lawfulness of the initial recognition remains open to challenge for the period of the Act's statute of limitations but can no longer be put in issue after that. *Local Lodge No. 1424, Int'l Assn. of Machinists, AFL-CIO (Bryan Mfg.) v. NLRB*, 362 U.S. 411, 416-17, 419 (1960). Accordingly, the Union's majority support at the time of recognition cannot be challenged at this date.

Since that time, BBH has executed Letters of Adherence binding itself to the terms and conditions of the Commercial Contracts, the most recent of which expired on March 31, 2016.<sup>12</sup> Those contracts, which made the Union the exclusive bargaining representative for the respective bargaining units, establish the Union's continued Section 9(a) status through March 31, 2016 and, for the reasons discussed below, after the date of Respondent's unlawful withdrawal of recognition. See, e.g., *Raymond Kravis Center for the Performing Arts*, 351 NLRB 143, 144 (2007) (union obtains Section 9(a) status through the "exclusive" bargaining representative language in the CBA) and *Triple A Fire Prot., Inc.*, 312 NLRB 1088 (1993) (by voluntary execution of an agreement granted the Union 9(a) status).

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<sup>12</sup>BBH also maintained the status quo of the collective bargaining relationship after expiration until November 21, 2017. (JT-1(20)).

**B. Respondent withdrew recognition without proof that the union had actually lost majority support**

In order to promote the Act's policies of industrial stability and employee free choice, the Board presumes that, once chosen, a union retains its majority status. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996), affirming 60 F.3d 24 (1st Cir. 1995), enforcing 317 NLRB 364 (1995). The presumption of majority status is irrebuttable during the term of a collective-bargaining agreement; upon expiration of the collective-bargaining agreement, the presumption becomes rebuttable. *Id.* at 785-87.

In *Levitz Furniture Co. of the Pacific*, the Board held that an employer seeking to rebut the presumption of majority status must show with objective evidence that the union has lost the support of a majority of the bargaining unit as of the date that union recognition was withdrawn. 333 NLRB 717, 725 (2001). The Board has emphasized that an employer withdraws recognition from an incumbent union at its peril. *Id.* If the employer fails to show objective evidence, it will not have rebutted the presumption of majority status and the withdrawal of recognition will violate the Act. In short, "unless an employer has proof that the union has actually lost majority support, there is simply no reason for it to withdraw recognition unilaterally." *Id.* See also *Highlands Regional Medical Center*, 347 NLRB 1404, 1407n. 17, 1413 (2006) enfd. 508 F. 3d 28 (D.C. Cir. 2007); *Liberty Bakery Kitchen, Inc.*, 366 NLRB No. 19 slip opinion page 1, n. 1 (2018), *Anderson Lumber Co.*, 360 NLRB 538 (2014); *DaNite Sign Co.*, 356 NLRB 975 (2011).

BBH did not contend on November 21, 2017 that the Union had lost majority support in either of the two bargaining units, nor has it shown it had the objective evidence required at that time under *Levitz* in this proceeding.<sup>13</sup> Rather, as discussed below, it baselessly contends there

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<sup>13</sup> Respondent has asserted as an affirmative defense that this matter is time-barred under Section 10(b) of the Act. (GX-1(i).) There is no evidence BBH gave notice to the Union that it was withdrawing recognition prior to the November 21, 2017 letter. See *A & L Underground*, 302 NLRB 467 (1991); 29

was no duty to bargain due to the absence of a permanent bargaining unit. Respondent has not met its burden under *Levitz* to rebut the presumption of the Union's continued 9(a) status on or since November 21, 2017. Accordingly, the November 21, 2017 withdrawal of recognition violated Section 8(a)(5) and (1) of the Act.

***C. Respondent has refused to meet and bargain with the Union***

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."). Section 8(d) further requires that the employer "meet at reasonable times and confer in good faith with respect to . . . the negotiation of an agreement," and includes requirements with respect to "negotiating a new contract." *Id.* § 158(d). It is firmly-established law that the duty to bargain encompasses the duty to negotiate a successor collective bargaining agreement. *E.g., ADT, LLC*, 363 NLRB No. 36, at 2 (2015); *Dominion Sprinkler Servs., Inc.*, 319 NLRB 624, 634 (1995).

The Union's demands to bargain successor agreements and workplace safety were clear, specific, and related to terms and conditions of employment under Sections 8(a)(5)(1) and (d). (JT-1(21, 23); JT-2(AA, CC)). Respondent does not deny the refusal to bargain. Rather, by its responses to the Union, BBH made clear that it would not bargain, contrary to Board law. (JT-1(22, 23); JT-2(BB, CC)). Therefore, by refusing the Union's bargaining demands, Respondent violated Section 8(a)(5) of the Act. *NLRB v. Katz*, 369 U.S. 736, 742–743 (1962) ("A refusal to negotiate in fact as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) ....").

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U.S.C. § 160(b). The underlying charge in this case was filed on May 14, 2018 and was served on May 17, 2018, within the statutory mandated six-month time period. (GC-1(A, B)).

***D. Respondent's affirmative defenses are without merit***

**1. Respondent may not refuse to bargain based on the composition of the unit by challenging its own voluntary recognition**

The Board has repeatedly recognized that employees in certain industries, such as the entertainment industry, typically have intermittent or short-term working patterns, and has accommodated that fact, for example, in establishing the eligibility formula for voting in an election, rather than excluding such workers from the Act's coverage as independent contractors. See, e.g., *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1765 (2011); *Kansas City Repertory Theatre, Inc.*, 356 NLRB 147, 147 (2010). The bargaining unit here consists of employees hired to perform in commercials on a production by production basis. (JT-1(3)). This reflects the nature of the industry.<sup>14</sup>

The undisputed evidence shows that BBH employed the bargaining unit employees under the terms of the Commercial Contracts throughout the material period. Respondent's records show it employed 152 performers in 2016 and 102 performers in 2017. The Union's employment data summary shows BBH has consistently employed more than one performer every year since

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<sup>14</sup> See also *Blockbuster Pavilion*, 314 NLRB 129, 142 (1994), modified on other grounds, 331 NLRB 1274 (2000) (stagehands at venue that "sometimes worked only for a day" then laid off without promise of reemployment); *DIC Entertainment*, 328 NLRB 660, 660 (1999) (freelance production employees; Board uses flexible voter eligibility "suited to the unique conditions in the different entertainment industries, where employees are often hired to help on a day-by-day or production-by-production basis"); *American Zoetrope Prods., Inc.*, 207 NLRB 621, 622 (1973) (editors on television commercials with no expectation of rehire); *Median, Inc.*, 200 NLRB 1013, 1013-14 (1972) (crews in the film industry that are hired for a particular production and "sometimes only for a day's work and then laid off without any promise of reemployment"); *Independent Motion Picture Producers Association*, 123 NLRB 1942, 1950 (1959) (rejecting employer's argument that there could be no appropriate unit of motion picture musicians with "casual and irregular nature of employment" that enjoy "no stability in employment" and move from "employer to employer" with no expectation of rehire with particular employer); *McCann Erickson Corp.*, 107 NLRB 1492, 1493 (1954) (unit including actors employed by advertising agency on radio advertising spots); *Television Film Producers Ass'n*, 93 NLRB 929, 933-34 (1951) (actors in the motion picture industry were work "is occasional and temporary"); *Society of Independent Motion Picture Producers*, 94 NLRB 110, 112 (1951) (carpenters and set erectors employed for brief periods with frequent interchange); *American Broadcasting Co.*, 96 NLRB 815, 819 (1951) (actors on live television and motion picture productions).

2001. (JT-5(A); GC-3). Additionally, over the last 17 years, BBH has rehired numerous performers who had previously worked on BBH productions. (GC-2; GC-3). BBH paid into the contractual pension and health funds from 2001 well into 2018. (GC-2; 3).

It is equally well established that an employer may not challenge the validity of its initial voluntary recognition of a union in defense of its subsequent refusal to meet its statutory bargaining obligations, where the recognition took place more than 6 months prior to the filing of the refusal to bargain charge. See *Route 22 Auto Sales*, 337 NLRB 84, 85 (2001); *Sewell-Allen Big Star, Inc.*, 294 NLRB 312, 313 (1989).

Respondent, conflating unit scope with voter eligibility to challenge its own voluntary recognition twenty years after the fact, now asserts as an affirmative defense that it has no duty to bargain as there is no “permanent bargaining unit” because of the intermittent working patterns. BBH transparently seeks to do precisely that which Board policy disallows.

Finally, Respondent contends that it is under no statutory duty to bargain because it employs no stable employees. Respondent’s reliance on *D&B Masonry*, 275 NLRB 1403 (1985) is misplaced because, as discussed above, the employment patterns here reflect the nature of the industry. Moreover, in *D&B Masonry*, during a 19-month period, the employer employed more than one unit member for less one-third of the time. Here, according to BBH’s records, BBH employed 152 performers in 2016 and 102 performers in 2017, the year of the repudiation. (JT-5(A)). Of these, 57 performers worked multiple days in 2016, and 41 performers worked multiple days in 2017, the year of the repudiation. (JT-5(A)). Additionally, the evidence produced by Respondent shows that multiple performers worked for BBH on more than one commercial on more than one date in 2016, 2017, and even in 2018. Thus, the bargaining units here are not stable one man units. To the contrary, they consist of many employees employed for varying periods.

Further in this regard, Respondent does not contend that the withdrawal of recognition followed a change in the nature of BBH's business with any correlated change to the bargaining units' composition. Rather, it is undisputed that the units' composition has continued unaltered since BBH voluntarily recognized the Union in 1999 and 2000.

In sum, the two bargaining units are appropriate for collective bargaining under well established precedent and Respondent's defense for the refusal to bargain is fundamentally flawed because it relies on a tardy attack its own voluntary recognition twenty years after the fact.

**2. Respondent may not refuse to bargain based on the scope of the unit by challenging its own voluntary recognition**

For the reasons discussed above, the Union has been the Section 9(a) collective bargaining representative for the two bargaining units of intermittent employees for almost twenty years. The most recent agreements respectively provide that "[t]he Union is recognized by Producer as the exclusive bargaining agent for all principal performers" and "[p]roducer recognizes SAG-AFTRA as the exclusive bargaining agent for all Performers." (JT-2(E) pg. 2; JT-2(Q); JT-2(L) pg. 2; JT-2(T)).

The agreements further provide at Section I(5)(A)(1) (Scope of Contract) that "[t]he terms and conditions of this Contract apply to commercials produced by the Producers in the United States...." (JT-2(E) pg. 2; JT-2(L) pg. 2). Respondent seeks to rebut the Union's Section 9(a) status by arguing that the scope of the agreements shows the Commercials Contracts are a "pre-hire contract." While the record does not show the unit complements from twenty years ago, it is irrelevant to the refusal to bargain as a challenge on this basis is time barred.<sup>15</sup> *Route 22 Auto Sales*, 337 NLRB at 85.

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<sup>15</sup> The contractual union security clause includes the statutory 30-day period. (JT-2(E) pg. 103; JT-2(Q); JT-2(L) pg. 26; JT-2(T)). In the event Respondent here also challenges the Union 's Section 9(a) status on this basis, is well established that a union-security clause does not survive contract expiration and

Respondent's further contention that the scope of the agreement triggers new representational status to separate groups of performers before they are hired for independent commercial productions is illogical. The Commercials Contracts by their terms apply to performers "employed by the Producer (employer)." While BBH performs work for customers and may employ different employees depending on the nature of the performance, majority status once conferred is not contingent on the identity of the employees or the customers.

Respondent's reliance on Member Miscimarra's dissent in *David Saxe Productions, LLC*, 364 NLRB No. 100 (2016), is misplaced because the hypothetical presented therein relates "to a production that has not yet opened" without specifying whether the employer has recognized the Union as the Section 9(a) representative. Absent this fact, to posit that a union cannot be the 9(a) representative when it is not the 9(a) representative is not helpful. Such circular reasoning deserves short shrift.

## V. CONCLUSION AND REMEDY

In conclusion, the evidence on the record is undisputed and supports a finding that Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition of the Union as the Section 9(a) collective bargaining representative of BBH's employees and subsequently refusing to bargain with the Union.

For the foregoing reasons, Counsel for the General Counsel respectfully urges this Administrative Law Judge to find that Respondent violated Section 8(a)(5) and (1) of the Act as alleged. The General Counsel respectfully requests that the ALJ order Respondent to recognize and bargain with the Union; notify the Union, in writing, of any changes made to Unit employees'

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therefore could not be enforced post-expiration. *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB 234, 235 (2010). Further, even if the clause was to be determined unlawful, it would fail to nullify an entire contract. *Flying Dutchman*, 329 NLRB 414 (1999).

wages, hours, and other terms and conditions of employment subsequent to November 21, 2017; upon request of the Union, rescind any such changes; make all affected Unit employees whole for any losses they incurred by virtue of these changes in their wages, hours, and other terms and conditions of employment, including all contractually required contributions to the Union's benefit funds, after November 21, 2017; and a notice remedy to be mailed to all current employees and former employees who were employed at any time since November 21, 2017, in English and any other relief as may be just and proper.

Dated at New York, New York  
This 12<sup>th</sup> day of April 2019



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