

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

EDISON ASSOCIATES LLP d/b/a THE SUPPER CLUB

and

Case No. 2-CA-37415

ACTORS EQUITY ASSOCIATION

Simon-Jon H. Koike, Esq.,

New York, NY, for the General Counsel.

Martin Thesing, President, for the Respondent.

*Eric P. Greene, Esq., (Spivak, Lipton, Watanabe, Spivak,
Moss & Orfan, LLP), New York, NY, for the Union.*

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Based on a charge and an amended charge filed on January 3, and February 22, 2006, respectively, by Actors Equity Association (Union) a complaint was issued on March 31, 2006 against The Supper Club, its name being amended at the hearing to Edison Associates LLP d/b/a The Supper Club (Respondent).¹

The complaint alleges essentially that the Respondent, after having entered into an agreement with DRDC for the staging of a theatrical production called The Rat Pack is Back (TRPIB) at the Respondent's premises unlawfully (a) directed DRDC to discharge Robert Thurber because he was a member of the Union (b) threatened DRDC that it would close TRPIB if it did not discharge Thurber (c) directed DRDC to get the Union out of its facility (d) threatened to replace TRPIB if DRDC did not get the Union out of its facility (e) caused DRDC to discharge Thurber and the cast of TRPIB from employment and (f) removed the Union House Board from the theater lobby.² The answer denied the material allegations of the complaint and on November 29 and December 13, 2006 a hearing was held before me in New York City.³

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the General Counsel, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent, a New York corporation having an office and place of business at 240

¹ The name of the Respondent was amended at the hearing.

² In his brief, Counsel for the General Counsel withdrew complaint allegation paragraph 7(c) which alleged that the Respondent directed DRDC to discharge the cast of TRPIB because of their Union membership.

³ Counsel for the General Counsel's motion to correct the transcript is granted. "Rachlin" is substituted for "Rackland" and "Jacksina" is substituted for "Jack Jr." and "Jack Sr."

West 47th Street, New York, NY, has been engaged in the operation of a dinner theater and nightclub. Annually, the Respondent derives gross revenues in excess of \$500,000 and purchases and receives at its New York City facility services, products, goods and materials valued in excess of \$50,000 from points outside New York State. The Respondent admits and I
 5 find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.⁴

II. The Alleged Unfair Labor Practices

A. The Facts

1. Background

15 The Rat Pack is Back (TRPIB) is a musical stage production in which certain actors portray the group known as "The Rat Pack," consisting of Frank Sinatra, Dean Martin, Sammy Davis, Jr., and Joey Bishop. An actress also appears in the show.⁵ The performance is accompanied by 12 to 15 live musicians.

20 David Cassidy and Don Rio co-wrote the show in 1999. Two corporations were formed. DRDC, Inc. was incorporated in 1999 to produce musical stage productions, and TRPIB, owned by Cassidy, was incorporated in New York to produce the TRPIB show at the Respondent's premises. The show has staged more than 1000 performances at various venues in North America.

25 Chip Rachlin, at first the booking agent and then the general manager of DRDC negotiated with Martin Thesing, the president and owner of the Respondent in about July, 2005 to stage the show at the Respondent's premises. During the negotiations, Cassidy visited the Supper Club and was shown the physical layout of the premises. He informed Thesing that the
 30 facility must be renovated in order to create dressing rooms, showers, toilets and sinks for the actors' use. Thesing agreed to make those renovations, admitting that the dressing rooms were not "the best."

35 After a period of negotiations and in which Rachlin made changes in a proposed agreement which Thesing requested, including that Cassidy perform a "cameo role" as Bobby Darin, Thesing signed an agreement dated September 1, 2005.⁶ The contract stated, among other things, that "this document, when signed by you [Thesing], will be a binding agreement between yourself and DRDC, Inc., producer of 'The Rat Pack is Back.'" The contract states that the engagement will premier during the week of November 14 and will continue through
 40 calendar year 2006 with an initial run of a minimum of 11 weeks. It stated further that the Respondent may cancel the show with at least 30 days notice. Accordingly, the contract

45 ⁴ The answer denied knowledge of the labor organization status of the Union. Richard Berg, the Union's senior business representative, testified that it exists for the purpose of representing its members who number about 45,000, concerning working conditions. It has numerous collective-bargaining agreements with employers.

⁵ The performers were Michael Civisca, Mark Cohen, Emilee Dupre, Rick Michel, Julian Rebiletto, and Eric Jordan-Young. The stage manager and assistant stage manager were Robert Thurber and Pamela Edington, respectively, and the wardrobe/hair person was Jessie
 50 Allen Phillips.

⁶ All dates hereafter are in 2005 unless otherwise stated.

provided that the show would run for a minimum of 15 weeks. Thesing told the two men that the show would run as long as it was successful.

Essentially, the contract provided that DRDC would receive a fee of \$60,000 per week and 50% of the ticket sales in excess of the venue's costs plus a 20% promoter's profit. DRDC agreed to provide and pay for the cast, stage manager, production manager, musicians and band leader, insurance, props/costumes, payroll taxes, and travel/airfare for cast/crew. The Respondent agreed to provide and pay for the marketing budget (mutually approved) to begin two months prior to opening, venue and all front of the house and backstage personnel, music royalties, rehearsal and casting costs, sales team, insurance, and hotel accommodations for non-New York cast and crew. The Respondent agreed to pay an advance of \$25,000 recoupable out of ticket sales. The contract further provided that the Respondent and DRDC will jointly agree to a marketing plan, public relations firm, and advertising/promotional materials. It was agreed that merchandise sales would be divided 75% DRDC, 25% Respondent, following the cost of goods.

As set forth above, the contract also provided that DRDC would provide and pay for the musicians. However, Thesing told Rachlin that he (Thesing) wanted to provide the musicians because he believed that he could obtain them for a lower price and deduct that sum from the amount he owed Cassidy. Shortly thereafter, Thesing informed Rachlin that he was not able to retain musicians and asked that DRDC resume that responsibility. Accordingly, on November 12, Thesing signed an agreement in which Cassidy agreed to obtain the musicians and Thesing agreed to wire \$15,600 for each of two weeks beginning November 14.⁷

On September 2, the day after the contract was signed, Rachlin advertised for an open cast call audition in "Backstage" Magazine. The advertisement lists the production as "nonunion." At that time, Cassidy had not yet entered into an agreement with the Union. Cassidy and Thesing were not satisfied with the auditioning actors, and thereafter Cassidy hired casting director David Clemens who acted as the agent of certain actors who were subsequently hired.

2. Cassidy Signs a Contract with the Union and the Respondent's Reaction

On October 21, Cassidy, as the producer of TRPIB signed a "Cabaret Agreement" with the Union in which he recognized the Union as the collective-bargaining representative of the actors, stage managers and assistant stage managers. He also agreed to employ a stage manager and assistant stage manager as required by the 64 page Union agreement and Rules (rule-book). The stage manager hired was Robert Thurber, a Union member, whose responsibilities included coordinating the artistic and technical elements of the show and enforcing the Union's rule-book. Thurber stated that it is common knowledge in the theater industry that the stage manager enforces the Union contract and rule-book.

In late September or early October, 2005 and again on November 5 when Thesing visited the Mohegan Sun Casino in Connecticut and saw the show, he spoke with Cassidy and Rachlin about the preparation of the Respondent's facility. They reminded Thesing that the dressing rooms, toilets and showers must be completed and Thesing replied that work on the stage would be finished shortly and then he would work on the dressing rooms. Thesing testified that he liked the show, and booked it for an "open-ended run – as long as it was profitable." He

⁷ Thesing claimed that he was unable to obtain the musicians he wanted because they could not obtain approval from their union to perform at the show.

assured Cassidy that the work would be done.

That same day, November 5, after inspecting the Respondent's premises, Thurber sent an e-mail to Rachlin describing the deficiencies in the facility. He stated that dressing rooms
 5 were needed for the five performers and for Cassidy as well as toilets, sinks/basins with hot and cold running water, at least one shower, dressing stations with make-up mirrors and lighting, and space for a wardrobe person. He stated that the areas he was shown which were designated as available for dressing rooms were inadequate – a small office, a pantry area, an accounting office, storage area on the third floor, and if they were to be used as dressing rooms,
 10 needed cleaning and the installation of plumbing. His letter conceded that "this is a lot" but the items identified were required and were not "going to go away." The letter stated that Thurber wanted to be able to show the actors, who were expected to arrive in a few days, proper dressing rooms. Thurber testified that in drafting this e-mail he referred to the Union's rule-book requirements.⁸

15 Rachlin forwarded the e-mail to Thesing on November 7 when the company arrived in New York from Connecticut. Rachlin's note said that the letter was from his stage manager, and although conceding that Thesing was "doing a lot of work on the stage," nevertheless Thesing "needs to address this aspect of the project." Rachlin told Thesing that "we do need to have a
 20 plan in place" and suggested two phases: one in November and the other after the show's official opening night in mid December.

Rachlin testified that a couple of hours after sending the e-mail he received a "very loud" phone call from Thesing who said he wanted Rachlin to discharge Thurber and he wanted
 25 "Equity out of the building." Thesing threatened that if those two demands were not met he would find a "cheaper and different Rat Pack company." Rachlin responded that Thesing had promised to provide adequate dressing room space.

Thesing testified that he repeatedly told Cassidy and Rachlin that the Supper Club was a
 30 "non-union house" and that they lied to him by bringing in a union production, at first telling him that the show would be non-union. When he later learned that Cassidy had signed a union contract "behind my back" and that the production would be performed pursuant to Union rules, he "confronted" Rachlin who said that Cassidy and his family were Union members "forever." Thesing conceded that he told them that "I cannot afford a union show, and it has to be a non-union show...."

In the period November 9 through 11 with previews scheduled to begin on November 16, Cassidy and Rachlin were anxious to have the dressing rooms completed and met numerous
 40 times with Thesing. According to Cassidy, Thesing became "combative and angry" in reference to Thurber's e-mails, saying that "no one would tell him what to do" and that Thurber was causing him "nothing but trouble and he was doing so because he was a union member." Rachlin quoted Thesing as saying that he wanted Thurber fired, and that he had told us "repeatedly that he did not want Equity in the building, and if we did not get Equity out of the building that he was canceling the run." Cassidy responded that he could not discharge Thurber
 45 because he needed a stage manager, noting that Thurber was simply asking that Thesing keep his promise by providing adequate dressing rooms. Thesing replied that he wanted Cassidy to discharge Thurber "because Thurber is Equity and I don't want Equity in here." Cassidy responded that it was irrelevant that Thurber was a member of the Union.

50 ⁸ The Union rule-book requires separate dressing rooms for male and female actors, separate toilet facilities, sinks with hot and cold running water, and lighted make-up mirrors.

Cassidy and Rachlin told Thesing that TRPIB had received many awards in other venues and they believed that the show could win a Tony Award. Thesing replied that he did not want the show submitted for a Tony Award since the Tony Awards are “connected to Equity” and that “Equity was a union that he did not want in his house.”

In an e-mail in early November, Thurber told Rachlin that a “program” and a “House Board” must be produced. Both are required by the Union rule-book. The program includes such information as the names and biographies of the actors and the people responsible for the production and is given to each member of the audience. The House Board lists the names of the actors and is displayed in the lobby of the theater. Rachlin forwarded the e-mail to Judy Jacksina, the public relations person for the Respondent, who responded that Thesing “emphatically said that he did not want” a program. Cassidy also told Thesing that he wanted “Playbill,” a publication distributed to the audience which lists the biographies of the actors and notes the people who were responsible for the production. Thesing responded “We’re not having Playbill in here. Playbill is Equity. I don’t want Equity in here.”

On November 10, David Clemens, the casting director who was the agent for a number of the actors, advised Rachlin by e-mail that dressing rooms are a “big issue,” the House Board was “required by Equity,” and the “rule-book states that we must have a program.” Clemens warned that “all of these issues are things that Equity can come in and shut us down for.”

3. Preview Performances Begin and the Respondent’s Continued Demands for the Discharge of Thurber and the Ousting of the Union

Previews of the show began in the evening of November 16. That morning, Clemens sent an e-mail to Thesing, Rachlin and others in which he stated that “we all need to deal with the fact that we are potentially with some VERY upset actors and a potential order of work stoppage by Equity if we do not deal with these issues.⁹ Who can make Martin [Thesing] understand that these are MUSTS.” (emphasis in original) Thesing responded with the remark “My red lights are going out...” He testified that by that phrase he meant that, as he mentioned often to Rachlin, that “I wanted to have a non-union production in the Supper Club because of costing issues, and it was very clear to Mr. Cassidy and to Mr. Rachlin, and we talked about it because of the costing issue. We are a non-union house. We are not a big theater. We don’t have \$6, 7, 8 million of revenues. That’s why that was important for me not to go into costing issues that could get out of hand.” Thesing added that he was not aware that the actors were complaining about anything.

That day, November 16, Cassidy and Rachlin met with Thesing who said that he would not complete work on the dressing rooms because they did not discharge Thurber. “I asked you to get rid of Thurber, and I don’t want Equity in here.” Cassidy protested that they were about to have their first preview that night, and that he was forced to pay for hotel rooms for the actors since the dressing rooms were not done. Cassidy insisted that work on the dressing rooms proceed. Thesing said “I told you I want Thurber gone. I told you I want Equity out.” Cassidy responded that he could not discharge Thurber because he is a “necessity” and “calls the show.” Cassidy added that he had a contract with the Union and could not remove the Union, adding that the Union was only interested in facilities for the performers – dressing rooms, showers, toilets and sinks, and would not bother him otherwise.

⁹ Rachlin testified that the issues Clemens was referring to included the dressing rooms, House Board and program.

Cassidy testified that on November 15 or 16 Thesing threatened that if he did not remove the Union he might bring another Rat Pack show in the theater. In an exchange of e-mails dated November 19 and 20, Thesing advised Rachlin that "there is no agreement. There is a handshake between David and myself, done at Mohegan Sun ... expressing our wishes to get to a mutual agreement. As everybody knows, we are not there yet." Rachlin responded that "I understand what you're saying and will discuss with David tomorrow afternoon. Regardless of what the final number is, we need to know what money will be wired into the account by close of business Monday to meet the payroll and weekly expenses for this past week."

Cassidy stated that one week after the start of the previews, about November 21, the actors and their agents told him that inasmuch as they had been promised dressing rooms, a program and a House Board, the absence of those facilities and required publications was "unacceptable." In order to accommodate them, Thurber prepared a basic program and House Board and posted it that day.¹⁰ The programs were not distributed but were kept in Thesing's office, and the House Board was taken down the next day by Thesing's representative who said that Thesing would not permit it to be posted. Thesing testified that one of his employees told him that "something" was posted in the lobby. Thesing asked what it was and directed that it be removed.

Also that day, November 21, Cassidy and Rachlin met with Thesing who again insisted that they discharge Thurber and get rid of the Union or the show would be closed. Cassidy testified that he was under a tremendous amount of stress and was "bombarded" with complaints from the actors and their agents concerning dressing rooms and sanitary facilities. That day, Thesing asked Rachlin to assure him that this was a non-union production regarding "the costing issue" and on November 22 Rachlin faxed a copy of the Backstage Magazine's cast call of September 5 which stated that it was a non-union show.

The following day, November 23, in response to Cassidy's "begging and pleading," the Union faxed a letter to him confirming that it understood that work on the dressing rooms was in progress and that the Union "is satisfied with that. I know of no other venue issues involving Equity at this time. We will work with you on any other issues that arise and will not go directly to the management of the Supper Club since you as Producer are solely responsible to Equity." Cassidy brought the letter to Thesing who responded that he did "not give a damn. It doesn't mean a thing." Cassidy replied that the letter is very significant, stating that if Thesing provides the dressing rooms, the Union has "no interest in what's going on here" and would not interfere with his business or with the show. Thesing responded "I told you I want Equity out," threw the letter in the air and said "this means shit. I told you I wanted Thurber out. I told you I wanted Equity out." In a desperate attempt to keep the show going, Cassidy and Rachlin asked Thurber to resign. Thurber's testimony confirmed that request. Before he could respond, the show was closed.

Cassidy stated that on November 25 or 26, Thesing told him that he would not make the payment due that day for the musicians as he had agreed because he told Cassidy to discharge Thurber and remove the Union and he did not do so.

Rachlin posted a notice which stated that the final performance would take place on November 26. The notice also stated that such action was taken because of "insurmountable

¹⁰ The House Board was a simple, letter-size paper which listed the name of the show, the names of the cast and the name of the stage manager, Thurber.

problems with the venue and its ownership.” Cassidy testified that the show was cancelled because the dressing rooms, toilets, sinks and showers were never completed or even worked on as promised, and monies that Thesing promised to pay Cassidy for the musicians had not been paid as promised.

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After the show closed, in about December, a show entitled “Frank, Dean and Sammy” opened at the Supper Club. It had a short, about two week engagement, and then another show entitled “Frank and Friends” opened. Neither show was a Union production.

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III. Analysis and Discussion

A. The Violations of Section 8(a)(1) of the Act

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The Board has “consistently held that an employer may violate Section 8(a) of the Act not only with respect to actions taken affecting its own employees, but also by actions affecting employees who do not stand in such an immediate employer-employee relationship.” *Lucky Stores, Inc.*, 243 NLRB 642, 643 (1979).

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The relationship between DRDC and the Respondent was amicable when they entered into their agreement on September 1 in which each expected to have a successful production. Their fine rapport changed dramatically when Thesing became aware that DRDC entered into an agreement with the Union and when Thurber attempted to have the terms of the Union’s rule-book enforced.

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I credit the mutually corroborative and consistent testimony of Cassidy and Rachlin, much of which was supported by e-mails sent to Thesing and received by him. On the other hand, Thesing did not contradict much of the material testimony of those two men, and in fact his testimony that he insisted that this be a non-union production supports the allegations of the complaint. In addition, his testimony that he was not aware that the actors were complaining about anything is contradicted by the e-mail he received from Clemens which says that the actors’ upset may cause a work stoppage.

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Thurber, the stage manager of DRDC and the person appointed by the Union to enforce its rule-book, attempted to do so by noting in his e-mail of November 5 that dressing rooms, sinks and toilets were not provided. By making these demands, Thurber sought to enforce the terms of the rule-book and was thus engaged in protected, concerted activity. *Brad Snodgrass, Inc.*, 338 NLRB 917, 923 (2003), where a union business agent engaged in protected, concerted activity when he filed grievances in an attempt to enforce a collective-bargaining agreement even though he was not an employee of the employer.

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Thesing became aware that Thurber was attempting to enforce the rule-book when he received Thurber’s November 5 e-mail and immediately and repeatedly thereafter demanded that Rachlin and Cassidy discharge Thurber and remove the Union from the facility. I find, as testified by the General Counsel’s witnesses, that Thesing demanded that Thurber be removed because he was a member of the Union and Thesing did not want the Union in the facility. The term used, that Thurber was “nothing but trouble” is clearly a reference to his causing difficulty by attempting to enforce the rule-book. *Budrovich Contracting Co.*, 331 NLRB 1333, 1333 (2000), where “troublemakers” were discharged for asserting their union contractual rights.

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I accordingly find that Thesing unlawfully directed DRDC to discharge Thurber because he was a member of the Union and because he engaged in protected, concerted activities.

I also find that in mid-November and on November 21, Thesing unlawfully threatened to close the show if Thurber was not discharged. *International Shipping Assn*, 297 NLRB 1059, 1068 (1990), where an employer unlawfully threatened its subcontractor's employees that it would terminate the subcontract if they became unionized. Thesing's demand that Thurber be discharged is clearly proven through the testimony of Cassidy and Rachlin and also in Thurber's credible testimony that he was asked by those two men to resign so that the show could continue. The only reason for such a request was Thesing's threat to cancel the show if Thurber was not fired.

In addition, I find, as testified by the General Counsel's witnesses that Thesing unlawfully threatened to replace TRPIB with a different "Rat Pack" company. In fact he replaced the show with two shows with a similar theme. The obvious difference is that those shows were non-union productions.

I further find that the Respondent violated the Act by demanding that Cassidy and Rachlin remove the Union from its facility. Thesing conceded that his position was consistent – he repeatedly told the two men that the show must be a non-union production and Cassidy went "behind his back" in signing a contract with the Union. As set forth above, an employer violates the Act if it causes another employer to change or affect the working conditions of its employees. By directing DRDC to "get rid" of the Union on various dates in November, the Respondent sought to alter the working conditions of those employees because those conditions were governed by the Union's contract and rule-book.

I also find, as alleged, that the Respondent's removal of the House Board violated the Act. The Union contract required the posting of a House Board and Thurber prepared and posted one which simply listed the names of the performers and the stage manager and assistant stage manager. Thesing directed that it be removed and not re-posted.

B. The Violations of Section 8(a)(3) of the Act

1. The General Counsel's Prima Facie Case

It is the general rule that that "an employer does not discriminate against employees within the meaning of Section 8(a)(3) by ceasing to do business with another employer because of the union or nonunion activity of the latter's employees." *Plumbers Local 447(Malbaff Landscape Construction)*, 172 NLRB 128, 129 (1968). Thus, even if the reason for the cancellation of a contract by one company is because the employees of the other company sought unionization, no violation may be found. The theory of such a holding is that the Act prohibits discrimination against employees but not against employers, and in this context an employer is free to contract or cancel a contract with whomever it wishes.

If the two companies are joint employers, the action of one is considered the action of the other since they operate jointly for the purposes of labor relations, and a violation may be found against the canceling company. *Computer Associates International*, 324 NLRB 285, 286 (1997). If the two companies are separate entities, the company which canceled the contract may not be found in violation of the Act.

However, the result is different where "an employer violates the Act when it directs, instructs, or orders another employer with whom it has business dealings to discharge, layoff, transfer, or otherwise affects the working conditions of the latter's employees because of the union activities of said employees." *Dews Construction Corp.*, 231 NLRB 182 fn. 4 (1977). In such a case, the canceling company has "involved itself directly in the employment decision at

issue” by requiring another employer to take unlawfully motivated action against its employees. *Dews*, above; *Esmark*, 315 NLRB 763, 768 (1994); *Georgia-Pacific Corp.*, 221 NLRB 982 (1975). In such circumstances, a finding of joint employer status is not required. *Esmark*, above, at 768, and a violation may be found against the company which canceled the contract.

There is no allegation that DRDC and the Respondent are joint employers. Accordingly, the following analysis will be concerned with whether the Respondent canceled its contract with DRDC because of the union activity of the employees of DRDC thereby causing DRDC to discharge them, and if so, whether the Respondent involved itself directly in the employment decisions of DRDC.

An analysis pursuant to *Wright Line*¹¹ is required to determine the first issue. *Whitewood Maintenance Co.*, 292 NLRB 1159, 1165 (1989). To satisfy his threshold burden of proof under *Wright Line*, the General Counsel must establish that the union activity of the employees of DRDC was a substantial or motivating factor in the Respondent's canceling its contract with DRDC. *Manno Electric*, 321 NLRB 278, 281 (1996). If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of such union activity.

I have found, as set forth above, that Thesing and DRDC entered into a mutually acceptable contract on September 1, at which time Thesing agreed to make certain alterations at the Supper Club including the renovation of dressing rooms and the installation of sinks and toilets. At that time and until early November, Thesing believed that the production was non-union. This belief was reinforced by the open cast call advertisement which listed the show as non-union.

A drastic change in Thesing's attitude toward DRDC and the production occurred in early November. By that time, Thesing learned that Cassidy signed a Cabaret Agreement with the Union. That agreement required the hire of a stage manager. On November 7, despite having agreed to continue to make the alterations requested, Thesing was forwarded Thurber's e-mail of November 5. The e-mail, which identified Thurber as the stage manager, and was forwarded to Thesing by Rachlin, noted that the extensive, required renovations in the facility had not been made.

That e-mail at once served to identify Thurber as the stage manager who as a “third party” between Thesing and DRDC was demanding that Thesing comply with his agreement with DRDC to make the improvements and also comply with the Union rule-book which required these items – Thesing later said that “Thurber is Equity.” Thesing's response to the e-mail was immediate and forceful. He demanded that Rachlin discharge Thurber and that the Union be removed from the facility.

Thereafter, as set forth above, Thesing repeatedly made these demands, saying that his was a “non-union house,” Thurber was “nothing but trouble” because of his union membership, and threatening to cancel the show and replace it. Finally, Thesing refused to make a payment for the musicians because DRDC did not discharge Thurber and oust the Union from the facility. Without a band the show could not go on and Cassidy closed the production.

As set forth above, I have found that the General Counsel has established that Thurber engaged in activity in behalf of the Union by insisting that the Union's contract and rule-book be

¹¹ *Wright Line*, 251 NLRB 1083 (1980).

adhered to. I have also found that Thesing was aware of such activity by identifying him as a member of the Union and blaming him for causing trouble as a union member. Thesing engaged in numerous violations of Section 8(a)(1) of the Act in threatening that Thurber be discharged, that the Union be ejected from the Supper Club, and that the show be replaced.

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I further find that the General Counsel has established that Thurber's union activity was a substantial or motivating factor in the Respondent's decision to terminate its contract with DRDC, cause DRDC to close the show and discharge its staff. It is clear that Thesing bore strong animus against the Union. He directed DRDC to discharge Thurber and oust the Union because of Thurber's union membership and because he attempted to enforce compliance with the Union's contract and rule-book. When DRDC refused to accede to its demands that Thurber be discharged and the Union be removed from the premises, the Respondent then refused to adhere to its agreement to complete work on the dressing rooms and pay the musicians. It is clear that if the Union had not had a contractual relationship with Cassidy and if Thurber had not insisted that Thesing renovate the dressing rooms pursuant to the Union rule-book, the Respondent would not have taken the actions it did.

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Whether the Respondent itself canceled its contract with DRDC or constructively caused DRDC to cancel the contract by refusing to pay the musicians and refusing to complete the dressing rooms is of no moment. The contract was canceled by force of the Respondent's actions.

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I accordingly find that the General Counsel has made a prima facie showing that the Respondent was motivated in canceling its contract with DRDC by the union activities of Thurber and the fact that DRDC had a contract with the Union.

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2. The Respondent's Defenses

Having found that the General Counsel has made a prima facie showing that the Union membership and activities of Thurber was a substantial or motivating factor in the Respondent's actions, the burden then shifts to the Respondent to prove, as an affirmative defense, that it would have taken the same action even in the absence of such union activity. *Wright Line*, above.

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The Respondent argues first that it had no binding agreement with DRDC – only a “handshake.” However, as set forth in their agreement that Thesing signed on September 1, Thesing agreed that it was a “binding agreement.” Thesing acted as if it was binding on him since he considered the show to be “open-ended” in duration assuming it was profitable, and permitted nine preview performances to be held at his theater.

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The Respondent also argues that it believed that the production would be non-union, and that it could not afford the cost of a union contract. Thesing testified that when he first became interested in having TRPIB production at the Supper Club, he had a number of discussions with Cassidy and Rachlin concerning cost issues, including the allocation between the parties of marketing costs, advertising expenses and public relations work. In a fax dated August 30, Rachlin told Thesing that “the only open numbers ... were marketing and hotels.” Rachlin advised Thesing “if you can make another pass at your bottom line numbers, I think we can make this work.” Thesing expected that further discussions would take place with an eventual agreement on these terms when Rachlin called him the next day demanding that he sign a contract immediately or Cassidy would no longer be available. Nevertheless he signed the contract the next day with, as Rachlin testified, the changes sought by Thesing, and which included specific figures.

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Thesing testified that he agreed to sign the agreement as long as the parties would eventually agree on the division of costs, and that the contract be considered "nonbinding." Rachlin agreed to discuss those terms later. Thesing signed the contract dated September 1 which states that "this document, when signed by you [Thesing], will be a binding agreement between yourself and DRDC, Inc., producer of 'The Rat Pack is Back.'" Thesing said that he marked on his copy of the contract terms he wanted discussed and faxed it to Rachlin. However, the copy Rachlin received which was admitted in evidence bore no notations of any kind other than the agreement itself. Accordingly, we have a written contract that Thesing signed as being binding on him. The only open issue, according to the contract, is that marketing costs would be mutually agreed upon by the parties.

Thesing stated that a few days later, Cassidy called and said that he had some "issues," and Cassidy threatened to sue him. Thesing told him to speak to Rachlin about any matters, but in any event, he allegedly told Rachlin "we do not have any agreement." Thesing then suggested that the arrangement between them be canceled. After that, they reconciled and agreed to work together. Accordingly, if there was any initial difficulty, such issues were resolved shortly after September 1, and Thesing, in effect, ratified his agreement to the contract. It was only when the Union entered this drama that Thesing's attitude changed.

Thesing stated that he was surprised when he heard that Cassidy closed the show. He said that up to that point he and Rachlin had gone "back and forth" over the financial figures from September to November trying to "finalize the deal," and Rachlin called several times in an attempt to "make it work" but they never came to a final agreement on allocating the costs of the performance. However, he conceded that previews were begun despite the fact that no alleged final agreement was reached, "because the contract was there."

Thesing stated that "if the costing structure is right, it's fine." He noted that he and DRDC were negotiating on the costing structure, and Rachlin made several suggestions but the parties "never came to an agreement." The suggestions made by Rachlin did not include "specific union numbers on the union contract. He made cost run down of how much they, the production company, would need, ... that I don't have." Thesing testified that it was his understanding that the production would be non-union, and although he was not "against the Union" he could not afford a union production which would result in "too many costs." "The costing structure made it impossible to open the show if it was union."

The Respondent argues that it could not afford the cost of a union production. However, Thesing concedes that he did not discuss with Rachlin the cost of a union contract. In addition, Thesing contractually agreed to pay DRDC a specific figure for which DRDC would pay its staff. It is clear that if a union contract caused an increase of payments to the staff, DRDC would be responsible for such an increase. Any open issues, such as marketing costs, were to be "mutually agreed" by DRDC and Thesing.

I conclude that the Respondent has not met its burden of proving that it would have canceled its contract with DRDC and caused that company to close the show and discharge its employees even in the absence of Thurber's union activities. I thus find that a contract was signed with specific cost figures set forth, that the parties expected to have a long engagement, and that nine preview shows had already been performed at the time of the contract's cancellation. Thesing's disagreement with and aversion to DRDC arose only when he became aware that DRDC had signed a contract with the Union and that stage manager Thurber, acting to enforce the Union rule-book, insisted that the renovations that had been promised be completed. Prior to that time, Thesing expressed no opposition toward DRDC or to the staging

of this production. The Respondent has not proven that any alleged cost of the Union contract would impact on its operation.

3. The Respondent's Involvement with the Decision to Discharge the Employees of DRDC

Having found that the Respondent canceled its contract with DRDC because of the union activity of the employees of DRDC thereby causing DRDC to discharge them, I also find that the Respondent involved itself directly in the employment decisions of DRDC to discharge its employees.

The evidence is clear that Thesing demanded the discharge of Thurber because of his activities in seeking to enforce the Union rule-book. Thesing repeatedly directed and ordered DRDC to fire Thurber because he was a Union member causing "nothing but trouble." In fact, Thesing refused to make a payment for the musicians because DRDC did not discharge Thurber. Thus, Thesing's focus of attention in each of his discussions with Cassidy and Rachlin was that Thurber no longer have anything to do with the Respondent's facility because he was a Union member.

I accordingly find and conclude that the Respondent directed, instructed and ordered DRDC to discharge Thurber because of his union activities, and "involved itself directly" in employment decisions affecting DRDC's employee Thurber. Under these circumstances, the Respondent has violated the Act by canceling its contract with DRDC and causing the discharge of its employees. *Dews; Esmark; Georgia-Pacific*, above.

Conclusions of Law

1. By engaging in the following conduct because the employees of DRDC engaged in union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act:

Directing DRDC to discharge Robert Thurber because he was a member of the Union, threatening DRDC that it would close TRPIB if it did not discharge Thurber, directing DRDC to get the Union out of its facility, threatening to replace TRPIB if DRDC did not get the Union out of its facility, causing DRDC to discharge Thurber and the cast of TRPIB from employment, and removing the Union House Board from the theater lobby.

2. By canceling its contract with DRDC the Respondent has violated Section 8(a)(1) of the Act.

3. By causing DRDC to close its TRPIB production, thereby discharging its employees, the Respondent has violated Section 8(a)(1) and (3) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

By its actions the Respondent caused DRDC to cancel the TRPIB production and discharge its employees. The show was cancelled because Thesing unlawfully refused to have a Union production in his theater. Whether such cancellation was in fact because DRDC could

not pay its musicians because of the Respondent's refusal to honor its agreement to do so, or because Thesing conditioned honoring its agreement to renovate the dressing rooms on Cassidy's removal of the Union, the result was the same.

Inasmuch as the Respondent caused the cancellation of its contract with DRDC, an appropriate remedy, in order to restore the status quo ante, is the restoration of the contract and the resumption of the TRPIB production if DRDC is willing. *Automatic Sprinkler Corp.*, 319 NLRB 401, 402 fn. 2 (1995). The failure of the General Counsel to seek that remedy does not deprive me of the authority to impose it. *Willamette Industries*, 341 NLRB 560, 564 (2004).

The Respondent having caused the discriminatory discharge of certain employees of DRDC by the cancellation of its contract with DRDC, it must make them whole for any loss of earnings and other benefits, computed on a quarterly basis from November 27, 2005, the date of the next scheduled performance until (a) the Respondent makes an unconditional offer in writing to DRDC to resume its contract and requests that DRDC offer employment to the employees set forth below or (b) such time as it has been clearly established in compliance proceedings that the Respondent would have lawfully and nondiscriminatorily ended the DRDC contract and that the employees would have been laid off. Such backpay shall have deducted from such sums interim earnings as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987):

| | |
|-----------------|-------------------|
| Michael Civisca | Rick Michel |
| Mark Cohen | Julian Rebiletto |
| Emilee Dupre | Robert Thurber |
| Pamela Edington | Eric Jordan-Young |

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The Respondent, Edison Associates LLP d/b/a The Supper Club, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Directing DRDC to discharge Robert Thurber because he was a member of the Union, threatening DRDC that it would close TRPIB if it did not discharge Thurber, directing DRDC to get the Actors Equity Association (Union) out of its facility, threatening to replace TRPIB if DRDC did not get the Union out of its facility, causing DRDC to discharge Thurber and the cast of TRPIB from employment, and removing the Union House Board from the theater lobby.

(b) Canceling its contract with DRDC because the employees of DRDC engaged in union activities.

¹² 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 Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Causing DRDC to close its TRPIB production, thereby discharging its employees because those employees engaged in union activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer in writing to restore the contract dated September 1, 2005 between it and DRDC and resume the TRPIB production if DRDC is willing.

(b) Make the following employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision, from November 27, 2005, until (a) the Respondent makes an unconditional offer in writing to DRDC to resume its contract and requests that DRDC offer employment to the employees set forth below or (b) such time as it has been clearly established in compliance proceedings that the Respondent would have lawfully and nondiscriminatorily ended the DRDC contract and that the employees would have been laid off:

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|-----------------|-------------------|
| Michael Civisca | Rick Michel |
| Mark Cohen | Julian Rebiletto |
| Emilee Dupre | Robert Thurber |
| Pamela Edington | Eric Jordan-Young |

(c) Within 14 days after service by the Region, post at its facility in New York, NY, copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 7, 2005.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., February 21, 2007.

Steven Davis
Administrative Law Judge

¹³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT direct DRDC to discharge Robert Thurber because he was a member of Actors Equity Association (Union) and engaged in activities in its behalf.

WE WILL NOT threaten DRDC that we will close The Rat Pack is Back production if it did not discharge Thurber.

WE WILL NOT direct DRDC to get the Union out of The Supper Club because the employees of DRDC engaged in union activities.

WE WILL NOT threaten to replace The Rat Pack is Back production if DRDC did not get the Union out of The Supper Club.

WE WILL NOT cause DRDC to discharge Thurber and the cast of The Rat Pack is Back production from employment because the employees of DRDC engaged in union activities.

WE WILL NOT remove the Union House Board from the lobby of The Supper Club.

WE WILL NOT cancel our contract with DRDC because the employees of DRDC engaged in union activities.

WE WILL NOT cause DRDC to close its TRPIB production, thereby discharging its employees because those employees engaged in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer in writing to restore the contract dated September 1, 2005 between us and DRDC and resume the TRPIB production if DRDC is willing.

WE WILL make the following employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them from November 27, 2005, until (a) we make an unconditional offer in writing to DRDC to resume our contract and request that DRDC offer employment to the employees set forth below or (b) such time as it has been clearly established in compliance proceedings that we would have lawfully and nondiscriminatorily ended the DRDC contract and that the employees would have been laid off:

| | |
|-----------------|-------------------|
| Michael Civisca | Rick Michel |
| Mark Cohen | Julian Rebiletto |
| Emilee Dupre | Robert Thurber |
| Pamela Edington | Eric Jordan-Young |

EDISON ASSOCIATES LLP d/b/a
THE SUPPER CLUB

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614

New York, New York 10278-0104

Hours: 8:45 a.m. to 5:15 p.m.

212-264-0300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.