The Palm Beach Pops *and* International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists, and Allied Crafts of the United States, its Territories and Canada, IATSE, AFL–CIO, CLC, Local 623. Case 12–CA–21890–1

September 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

On June 30, 2003, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The General Counsel and the Charging Party both filed exceptions and supporting briefs, and the Respondent filed briefs in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order.

I.

As set forth more fully in the judge's decision, the Respondent operates a symphony pops orchestra located in Palm Beach, Florida. As part of its subscription series, it presents concerts at the Raymond F. Kravis Center for the Performing Arts (Kravis), which it has done since 1992. To obtain the necessary stagehands for its Kravis performances from 1992–1997, the Respondent contacted Kravis, which in turn contacted Local 623 for referrals under the Kravis-Local 623 collective-bargaining agreement. When the Kravis agreement expired in August 1997, Kravis and Local 623 signed a standard agreement, effective from March 4, 1998, through June 30, 2000. The standard agreement provided that, in order for it be effective, Kravis and outside presenters, such as the Respondent, must execute adoption agreements by March 11, 1998. When certain outside presenters, including the Respondent, failed to execute an adoption agreement, Kravis and Local 623 executed a second addendum to the standard agreement.[2] The following fall, as the 1998–1999 season drew near, Local 623 again contacted the Respondent, requesting that it sign an adoption agreement. Lisa Crawford, the Respondent's Executive Director, wrote to Local 623 on November 10, 1998, stating in pertinent part:

> In accordance with the Standard Agreement entered into between I.A.T.S.E. Local 623 and the Kravis Center, and the second addendum to that agreement dated March 11, 1998, the Palm Beach Pops agrees to pay the prevailing rates for wages and benefits agreed to by I.A.T.S.E. and the Kravis Center.

When Local 623 advised the Respondent that it would not supply stagehands without an executed adoption agreement, the Respondent asserted that the second addendum was still in effect.

Following an exchange of correspondence between the parties' attorneys, Local 623 President Terrence McKenzie wrote to Crawford, advising her that he understood that the Respondent had agreed to be bound by the Kravis agreement, and that if she shared his understanding, she should sign and return his letter. Crawford faxed a reply, stating that "in our letter of November 10, 1998, we agreed to abide by the CBA standard agreement including the second addendum which is part of that agreement, relating to the payment of the prevailing wages and benefits as set forth in the adoption agreement." When Local 623 Representative John Dermody informed Crawford that her reply sufficed, and that he would inform Local 623 that the Respondent had signed the agreement, she responded that the Respondent had signed nothing and had only agreed to pay prevailing wages and benefits.

The Respondent continued to receive referrals from Local 623 until April 12, 2001, the date of its last request and the end of the 2000–2001 season. In September 2001, the Respondent informed Local 623 that it would no longer use referrals from the Local 623 hiring hall because it was considering using Kravis' nonunion, in-house stage crew. Local 623 demanded that the Respondent bargain for a successor agreement, claiming that the Respondent had agreed to adopt the standard agreement and to maintain the status quo after the standard agreement had expired. On February 1, 2002, the Union merged with five of its sister locals to form IATSE Local 500.

[1] The General Counsel and Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

[2] Under the second addendum, Kravis agreed to continue "the courtesy administration of pass-through payroll expenses" until April 30, 1998, and Local 623 agreed to provide stage labor to the outside presenters without the necessity of executing the adoption agreement, so long as the outside presenters agreed to pay prevailing wages and benefits as set forth in the executed adoption agreements or at some other mutually negotiated rate.

II.

The judge dismissed the complaint in its entirety.[3] He found that while Local 623 repeatedly offered the Respondent the standard agreement, the Respondent never accepted it. Instead, the Respondent counteroffered by agreeing to pay prevailing wages and benefits, provided that Local 623 continued to supply labor. Crediting Crawford's testimony that she told Dermody that the Respondent had only agreed to pay prevailing wages and benefits, the judge concluded that, because the Respondent had consistently taken the same position throughout its oral communications and written correspondence with Local 623, there was no meeting of the minds, and therefore no agreement. Finding that no agreement had been reached, and that there was no other evidence establishing a bargaining relationship between Local 623 and the Respondent, the judge concluded that the Respondent did not violate Section 8(a)(5), and that Respondent did not refuse to bargain for antiunion reasons or engage in other misconduct in violation of Section 8(a)(3) and (5).

III.

We agree with the judge's conclusion.[4] It is well settled that an employer and a union's adoption of a collective-bargaining agreement "is not dependent on the reduction to writing of the intention to be bound," but instead, "what is required is conduct manifesting an intention to abide by the terms of the agreement." See *E.S.P. Concrete Pumping, Inc*., 327 NLRB 711, 712 (1999). See *Arco Electric v. NLRB*, 618 F.2d 698 (10th Cir. 1980) (whether particular conduct in a given case demonstrates the existence or adoption of a contract is a question of fact), enfg. 237 NLRB 708 (1978). Here, Respondent never signed an agreement and, by its conduct, never manifested an intent to be bound to Local 623's agreement with Kravis and the other outside presenters. Indeed, the General Counsel has failed to prove that the Respondent ever voluntarily recognized Local 623 as the collective-bargaining representative of the unit employees through its oral and written communications with the Union. The credited testimony reflects only the Respondent's consistent position that it had no relationship with Local 623, beyond paying prevailing wages and benefits to employees referred by the Local.[5] Based on this failure of proof, we affirm the judge's dismissal of the complaint allegations.[6]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Karen M. Thornton, Esq., for the General Counsel.
Emanuel N. Psarakis, Esq., for the Respondent.
Matthew J. Mierzwa Jr., Esq., for the Charging Party.
I. Jeffrey Pheterson, Esq., for the Raymond R. Kravis Center.

DECISION

LAWRENCE W. CULLEN, Administrative Law Judge. A hearing was held in these proceedings in Miami, Florida, on October 28, 29, and 30, 2002. I have considered the full record as well as briefs filed by the General Counsel, the Charging Party, and the Respondent.

I. JURISDICTION

The Palm Beach Pops admitted the jurisdiction allegations. Respondent is a Florida corporation with an office and place of business in Palm Beach, Florida, where it is engaged in the business of operating a symphonic pops orchestra. During 2001 it derived gross revenues excluding contributions, in conducting its business operations in excess of $1 million; and it purchased and received at its Florida facility goods and materials valued in excess of $50,000 from points outside Florida. At all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Charging Party allegedly represented Respondent's employees as described below, until February 1, 2002, at which time the Charging Party merged with other locals to form Local 500. The complaint alleged among other things, that Local 500 has represented Respondent's employees in the following appropriate bargaining unit since February 1, 2002:

> All department heads and theatrical stage employees (including riggers, electricians, carpenters, lighting technicians, sound technicians, fitters, loaders, unloaders, and other technicians performing work in connection with sets, props, costumes, wardrobes, audio visuals, motion pictures, radio broadcasts, commercials and rehearsals) involved in presentations at Dreyfoos Hall of The Raymond R. Kravis Center for the Performing Arts, Inc.

[3] The complaint alleged the following 8(a)(1), (3), and (5) violations: refusing to meet and bargain with Local 623; failing to honor the terms and conditions of the parties' collective-bargaining agreement; refusing to use the Local 623 hiring hall; withdrawing recognition; and failing and refusing to use the Local 623 hiring hall for discriminatory reasons.

[4] In adopting the judge's finding that the Respondent did not violate Sec. 8(a)(3) and (1) of the Act, we find that the General Counsel failed to show that antiunion animus motivated its decision to cease utilizing referrals from the Local 623 hiring hall. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved by *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

[5] Although Crawford's fax stated in part that the Respondent "agreed to be bound by the CBA standard agreement," the remainder of the sentence and the letter to which it refers make clear that the Respondent only agreed to pay prevailing wages and benefits.

[6] In dismissing the complaint, we agree with the judge's conclusion that it is unnecessary to pass on the validity of the February 2002 merger between IATSE Local 623 and five of its sister locals to form Local 500, which the Respondent had raised as an affirmative defense to the 8(a)(5) and (1) allegations in the complaint.

Respondent admitted that the Charging Party (i.e., Local 623) has been a labor organization within the meaning of Section 2(5) of the Act, at all material times. It denied that Local 623 and other locals have merged into IATSE Local 500 and it denied that Local 500 is a labor organization.

John Dermody testified that he has been the IATSE Local 500 business agent since February 1, 2002. Dermody was business agent for Local 623 for 6 years before Local 500 was formed. He was elected to the Local 623 position. Dermody was appointed business agent for Local 500 by the IATSE president.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Facts

The allegations in the complaint include that Respondent previously recognized Local 623[1] as representative of its bargaining unit employees; that since September 2001 Respondent withdrew recognition and refused to bargain with Local 623; that since October 1, 2001, Respondent has refused to use Local 623's referral system[2] as the exclusive source of department heads and theatrical stage employees for performances at Dreyfoos Hall,[3] and Respondent has failed to honor the terms and conditions of employment; that Local 623 merged with other IATSE[4] local unions including Locals 316, 545, 646, 827, and 853, and formed IATSE Local 500 which, since February 1, 2002,[5] has represented Respondent's employees; and that Respondent has refused to recognize and bargain with Local 500 since February 1, 2002.[6]

The Kravis Center

Since it was founded in 1992 Respondent has frequently performed at the Raymond F. Kravis Center for the Performing Arts[7] in Palm Beach. Respondent's agreements with the Kravis Center have involved, among other things, use of the Kravis Center facilities with Kravis supplying staging employees.[8]

Local 623 has also been involved with the Kravis Center. Local 623 and the Kravis Center agreed to a collective-bargaining agreement in 1992 and another in 1998. The 1992 agreement was effective until August 31, 1997, and that agreement provided Kravis Center was agent on behalf of its licensees with regard to all costs incurred and that the Kravis Center would require all licensees to comply with the collective-bargaining agreement to the same extent as if such lessee was the presenter. Respondent was one of Kravis' presenters during that period of time. As shown below, during negotiations before the 1998 collective-bargaining agreement and subsequently Kravis sought to avoid responsibility for all its presenters.

An administrative law judge issued a decision in JD(NY)–70–02, regarding the Kravis Center and Locals 623 and 500. In that decision, the judge held that the Kravis Center engaged in unfair labor practices regarding negotiations with Local 623 as to actions before February 1, 2002. However, the judge also found that Local 623 did not successfully merge into Local 500; that Local 623 ceased to exist on February 1, 2002; and that the Kravis Center did not have a duty to recognize and bargain with Local 500 after February 1, 2002.

Respondent and the Union

Respondent was founded in 1992. From its founding, Respondent held performances at various venues including especially the Kravis Center. Although Respondent has consistently operated with a small permanent work force, it has used other employees in staging concerts. Respondent has used alleged bargaining unit employees, such as stagehands, carpenters, electricians, flymen, prop persons, riggers, sound personnel, lighting technicians, and others.

From 1992 through 1997, Respondent used the alleged bargaining unit employees for its Kravis Center concerts and Kravis provided those employees. Kravis and the Union agreed to a collective-bargaining agreement on September 9, 1992, and that agreement was effective until August 31, 1997 (GC Exh. 4, R Exh. 3).[9] Kravis agreed, among other things, to use the Union's hiring hall.

During the 1992–1997 period Kravis and Respondent used a "pass–through" agreement whereby Kravis provided stagehands referred by the Union and passed along the costs of employing those stagehands to its presenter. In the case of Respondent's Kravis concerts, Respondent was the presenter. Therefore, during the 1992 through 1997 period the Union supplied bargaining unit employees that worked for Respondent. Even though those referrals were made to Kravis, the referrals performed stage labor for Respondent and other Kravis presenters.

Kravis and the Union were not successful in contract negotiation regarding a successor contract to the 1992–1997 agree-

[1] In an amendment to complaint, the General Counsel alleged that beginning on or about "November 10, 1998, the Union (Local 623) was recognized by Respondent as the exclusive collective-bargaining representative of the unit. This recognition was embodied in letters dated November 10, 1998, and February 10 and 11, 1999, which also bound the Respondent to the collective-bargaining agreement, effective on its face from September 1, 1997, through June 30, 2000."

[2] The Union referral system is based on ABC lists. The A list was made up of journeymen and an employee was included on that list provided he or she worked at least 2000 hours within a 2-year period. The B list included employees that were not qualified for the A list, but that had worked a minimum of 1000 hours within a 2-year period and the C list was made up of casual employees with less than 1000 hours within a 2-year period.

[3] Dreyfoos Hall is the concert facility of the Kravis Center.

[4] International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists, and Allied Crafts of the United States, Its Territories and Canada, IATSE, AFL–CIO.

[5] Several of the alleged unfair labor practices occurred before February 1, 2002, when Local 623 allegedly merged with other locals to become Local 500.

[6] Local 623 and Local 500 are oftentimes collectively referred to herein as the Union.

[7] The Kravis Center for the Performing Arts is oftentimes referred to herein as Kravis and the Kravis Center and those terms may include all its performance venues including Dreyfoos Hall.

[8] Respondent has been a "presenter" at the Kravis Center since approximately 1992. It performs about 8 to 10 productions each year at The Kravis Center.

[9] The 1992–1997 Kravis–Union collective-bargaining contract applied to all presentations in the theater, whether presented by Kravis Center or by an outside presenter.

ment until March 1998. Among other things, Kravis took the position that it would no longer be responsible to the Union, for outside presenters. As a result the Union's proposed contract with Kravis required that it was effective provided all six regular Kravis presenters agreed to separate contracts. The Union submitted separate proposed collective-bargaining agreements to each of Kravis' regular presenters including Respondent. The Union sent that proposed agreement to Respondent on November 6, 1997, and stated among other things:

> As you may know, over the past five years, we have dealt with the Kravis Center, and you have dealt with the Kravis Center, and there has been no need for us to require a separate contract with you. Now, the Kravis center has indicated it no longer wants to work under he procedure that has been in effect for the past five years. Its representatives have stated they will not be responsible to provide our services to producers or promoters that use its facilities. Therefore, if you wish to continue to use our services as in the past, it will be necessary for you to have a signed agreement with our local union. We are enclosing our standard agreement. [GC Exh. 6.]

Subsequently, Kravis and the Union agreed to a "second addendum" to their collective-bargaining agreement on March 11, 1998, which provided:

> Local 623 agrees to provide stage labor to any of the six (6) outside presenter/employers[10] which presents at the Kravis center without the necessity of execution of our Adoption Agreement, so long as such organization agrees to pay the prevailing rates for wages and benefits as set forth in the executed Adoption Agreements, or at some other mutually negotiated rate. From the date of execution of this Second Addendum until April 30, 1998, the Kravis Center agrees to continue the courtesy administration of pass–through payroll expenses for any of the six (6) employers. The most favored nation language contained in the Adoption Agreement shall survive the execution of this Agreement and any rate changes which occur based upon such language shall be prospective in nature, from the date of execution of the Agreement containing such lower rates. Local 623 agrees that it shall not engage in any strike against any of the six (6) outside presenters from the date of this second addendum until April 30, 1998. [GC Exh. 8, last page.]

The Union wrote Respondent on September 21, 1998. About 1 or 2 weeks later the Union's John Dermody met with Respondent Executive Director Lisa Crawford. Crawford testified that she first learned of the Kravis/Local 623 second addendum after that meeting. A Kravis attorney faxed a copy of the second addendum to Respondent's Jim Fitzgerald on October 30, 1998. After reading the second addendum Crawford concluded that Respondent did not need to sign the agreement. Instead Respondent was only required to pay prevailing wages and benefits.

The Union wrote Respondent on November 3, 1998:

> Enclosed please find the Standard Contract for the Raymond F. Kravis Center, this is signed by both the Kravis Center and the Union. The Addendums are for the Rinker Playhouse and Gosman Amphitheater.[11] The Adoption Agreement is what will apply to us. Please note that under hourly and performance rates a favorite nations clause was agreed to. We have signed agreements with the other five presenters. You can be assured that there is parity under this agreement. [GC Exh. 9.]

Respondent Executive Director Lisa Crawford wrote the Union on November 10, 1998:

> This year, the Palm Beach Pops, Inc. will once again be utilizing the services of I.A.T.S.E. Local 623 and Raymond F. Kravis Center for the Performing Arts, Inc. In accordance with the Standard Agreement entered into between I.A.T.S.E. Local 623 and the Kravis Center, and the second Addendum to that agreement dated March 11, 1998, the Palm Beach Pops agrees to pay the prevailing rates for wages and benefits agreed to by I.A.T.S.E. and the Kravis Center and make those payments directly to Stage Paymasters, Inc. We appreciate Local 623 agreeing once again to providing stage labor to the Palm Beach Pops, Inc. for its concerts in this upcoming season. As in the past, we look forward to working with you. [GC Exh. 10.]

John Dermody testified that he phoned Lisa Crawford after receiving her November 10 letter and told her that her response was not enough and that the Union would withhold labor for the next concert if Respondent failed to sign the adoption agreement. Respondent's attorney wrote the Union on December 11, 1998:

> As we discussed regarding the union contract, the Pops has agreed to the proffered prevailing wage agreement offered by the Kravis Center and Local 623 in lieu of executing a full blown union contract. After we discussed the matter, you suggested that if the Kravis Center is agreeable, Local 623 has no objection to treating the Pops as one of the infrequent outside presents [sic] of performances at the Kravis Center under the standard agreement. Since the Pops is an infrequent outside presenter, the prevailing wage and benefit approach makes eminent sense, as, in this way, legitimate objectives of all parties are fully met. [GC Exh. 11.]

Lisa Crawford testified that she asked Kravis to treat Respondent as an infrequent presenter following Respondent's December 1998 performance. That request was denied on the basis that infrequent presenters were limited to two performances and Respondent was planning 12 performances during the next season.

After the Union told Respondent it would not provide labor for its February 14,1999 concert unless Respondent signed the adoption agreement, Lisa Crawford wrote the Union on Febru-

[10] The six outside presenters were Palm Beach Opera, Ballet Florida, Florida Philharmonic, Miami City Ballet, P.T.G. Florida, Inc., and Palm Beach Pops.

[11] Venues in the Kravis Center include Dreyfoos Hall, Rinker Playhouse, and Gosman Amphitheater.

ary 4, 1999. Crawford stated that even though Kravis would not view Respondent as an infrequent presenter, the second addendum to the Union's March 11, 1998 contract with Kravis was in effect (GC Exh. 12). The Union replied on February 10 that Respondent did not have a contract with the Union and that Respondent's reading of the contract to show that the second addendum was in effect was incorrect (GC Exh. 13).

The Union next faxed Respondent the following on February 10 (GC Exh. 15):

> I have reviewed the letter between Palm Beach Pops attorney Emanual N. Psarakis and you dated December 8, 1998; and your letters to John Dermody dated November 10, 1998 and February 4, 1999.
>
> It is my understanding from the letters that the Palm Beach Pops already agrees to be bound to abide by the CBA between the Raymond F. Kravis Center for the Performing Arts, Inc. and Local 623 I.A.T.S.E.
>
> If this is the case, I see no reason for a labor dispute or disagreement between Local 623 and the Palm Beach Pops.
>
> If this is your understanding please sign this letter and fax it back to me.

Respondent did not sign and return the Union's letter. Instead Respondent faxed the following to the Union (GC Exh. 16):

> As you know, in our letter of November 10, 1998, we agreed to abide by the CBA standard agreement including the second addendum which is part of that agreement, relating to the payment of the prevailing wages and benefits as set forth in the adoption agreement.
>
> We reaffirm that agreement and agree to abide by it.

Lisa Crawford testified that she then talked with John Dermody. Dermody said that her letter was good enough for Local 623 and that he was going to tell Local 623 that Respondent had signed the agreement. Crawford replied that she had never signed the agreement but that Respondent had agreed to pay prevailing wages and benefits (Tr. 438).

Crawford testified that she had no further problems with IATSE supplying labor after her talk with Dermody.[12] The Union supplied Respondent with employees until the end of the 2000-2001 season. Respondent's last request for employees from the Union hiring hall was made on April 12, 2001.

Respondent's Alleged Refusal to Bargain

Peter Marzilli was Respondent's production manager in September 2001. Marzilli testified about meeting with Jim Fitzgerald during that month. Fitzgerald was Respondent's director and conductor. Fitzgerald said they were considering using the Kravis crew instead of using the union hiring hall. Kravis had told Fitzgerald that in order to get the dates requested by Respondent it would have to use the Kravis crew.

Marzilli testified that he contacted John Dermody and told him Respondent probably would not be using union referrals for the upcoming season.

The Union through its attorney, wrote Respondent on October 4, 2001, that Respondent had previously agreed to abide by the Standard Agreement and even though that agreement expired on June 30, 2000, Respondent had continued to utilize that collective-bargaining agreement as status quo during the last season; but that Respondent had now taken the position that it would no longer abide by the status quo set out in the expired contract. The Union demanded that Respondent bargain for a successor collective-bargaining contract. (GC Exh. 20(a).)

Respondent replied through its attorney's letter dated October 10, 2001, by denying that Respondent had agreed to a collective-bargaining agreement with the Union. (GC Exh. 20(b.)

The Union through John Dermody wrote Respondent on October 25, 2001, and again requested bargaining (see GC Exh. 20(c)). Respondent has not agreed to bargain.

Subsequently, the Union merged with several other locals including Locals 316, 545, 646, 827, and 853 and formed IATSE Local 500. That merger was effective on February 1, 2002. The Union contended that Local 500 was the successor to Local 623 but Respondent disagreed.

Analysis and Conclusions of Law

As shown below letters determined many of the relevant issues and those letters were not in dispute as to credibility. There was one critical issue regarding a conversation between John Dermody and Lisa Crawford. Among other things, Crawford testified that she told Dermody that Respondent had never signed the agreement and all Respondent agreed to was to pay prevailing wages and benefits. As to that point I credit the testimony of Lisa Crawford.[13] I make that determination on the basis of her demeanor and the record as a whole.

Did Respondent Agree to a Collective-Bargaining Agreement

I find there was no agreement between Respondent and the Union. Simply put, I find that the Union repeatedly offered its standard agreement but that offer was never accepted. Instead Respondent repeatedly came back with a counteroffer. That counteroffer was to pay prevailing wages and benefits provided the Union would continue to supply employees through its hiring hall. The Union never accepted that counteroffer.

Counsel for General Counsel pointed to letters dated November 10, 1998, and February 10 and 11, 1999, to show that Respondent agreed to be bound by the Union's standard agreement effective from September 1, 1997, through June 30, 1998 (GC Exh. 7).

Respondent did write the Union on November 10, 1998:

> This year, the Palm Beach Pops, Inc. will once again be utilizing the services of I.A.T.S.E. Local 623 and Raymond F. Kravis Center for the Performing Arts, Inc. In accordance with the Standard Agreement entered into between I.A.T.S.E. Local 623 and the Kravis Center, and the second Addendum to that agreement dated March 11, 1998, the Palm Beach Pops agrees to pay the prevailing rates for wages and benefits

[12] Crawford's tenure with Respondent ended in September 1999.

[13] Lisa Crawford was the last witness in the hearing and no rebuttal was offered to her testimony.

agreed to by I.A.T.S.E. and the Kravis Center and make those payments directly to Stage Paymasters, Inc.

That letter shows that Respondent interpreted the "Second Addendum"[14] to mean it could continue to benefit by the Union supplying labor if it paid prevailing wages and benefits. The Union argued to Respondent that it misunderstood the standard agreement and the second addendum.

Perhaps, if I were considering what the Union and Kravis intended with the second addendum, I would agree with the Union's argument to Respondent. However, that is not the point at issue regarding Respondent and the Union. Regardless of whether Respondent understood or misunderstood the second addendum, it is clear they were agreeable to do nothing more than pay the prevailing wages and benefits. The question of understanding the second addendum is not relevant to that issue.

In order to fully appreciate the General Counsel's argument I shall also consider a letter other than those dated November 10, 1998, and February 10 and 11, 1999. Respondent wrote the Union (John Dermody) on February 4, 1999:

> Since Kravis is not willing to make this change,[15] then the second addendum to your Collective Bargaining Agreement with Kravis dated March 11, 1998 is in effect since the Pops agreed to abide by it. (See letter from Pops to you dated November 11, 1998 where it agreed to "pay prevailing rates for wages and benefits agreed to by IATSE and the Kravis Center".)
>
> Today you told me that the union insists that the Pops must sign the union contract or you will not provide the labor for our performance scheduled for February 14th. We cannot allow for this performance to be disrupted, and hope that you will not do so. We have complied and are willing to comply with the second addendum, and ask that you honor that agreement. Further, our lawyer advises that your threat to withhold labor is illegal under the National Labor Relations Act.
>
> John, we just ask that you honor the agreement to provide stage labor to the Palm Beach Pops as one of the six outside presenters at the Kravis Center. The second addendum specifically says it is not necessary for us to execute an adoption agreement, so long as we agree to pay the prevailing wage rates for wages and benefits. We did so. We simply ask that you abide by it.

Here again is the matter of the meaning of the second addendum. Perhaps, as the Union argued to Respondent, Respondent's belief that it could comply with that second addendum by simply paying prevailing wages and benefits was incorrect. Nevertheless, the February 4 letter (above) shows that is what Respondent is proposing.

The Union wrote Respondent on February 10, 1999, among other things:

> Your reading of the agreement between Kravis and IATSE 623 as permitting the Pops to continue to operate under the second addendum ignores the entire agreement between Kravis and the Union, which expressly excluded the Pops (and five other "outside presenters") from coverage under the Kravis contract. Moreover, the second addendum was to expire by April 30, 1998; and it expressly provides that after that date, the union may strike against any of the six outside presenters.
>
> . . . .
>
> [Y]ou claim, you are bound in any case by the Kravis agreement. It might be helpful if our clients could explore exactly what issues separate them, in terms of signing a separate agreement.

In the above letter, the Union restated that Respondent misunderstood the second addendum. However, the Union also stated in that letter that the parties should get together to explore their differences. Obviously, there were differences even if, as the Union argues, those differences were affected by Respondent failing to understand the Union's offer.

The Union president also faxed a letter to Respondent on February 10:

> I have reviewed the letter between Palm Beach Pops attorney Emanual N. Psarakis and you dated December 8, 1998; and your letters to John Dermody dated November 10, 1998 and February 4, 1999.
>
> It is my understanding from the letters that the Palm Beach Pops already agrees to be bound to abide by the

[14] The second addendum referred to by the parties, acted to amend the standard contract between Kravis and the Union (GC Exh. 7), by amending the third paragraph under sec. I.A. That subsection is entitled scope and the third paragraph as amended by the second addendum stated:

> Local 623 agrees to provide stage labor to any of the six (6) outside presenter/employers which presents at the Kravis Center without the necessity of execution of our Adoption Agreement, so long as such organization agrees to pay the prevailing rates for wages and benefits as set forth in the executed Adoption Agreements, or at some other mutually negotiated rate. From the date of execution of this Second Addendum until April 30, 1998, the Kravis Center agrees to continue the courtesy administration of pass–through payroll expenses for any of the six (6) employers, if requested to do so by these organizations at rates agreed upon by the Union and the Employer as identified in writing by these employers. The most favored nation language contained in the Adoption Agreements shall survive the execution of this Agreement and any rate changes which occur based upon such language shall be prospective in nature, from the date of execution of the Agreement containing such lower rates. Local 623 agrees that it shall not engage in any strike against any of the six (6) outside presenters from the date of this second amendment until April 30, 1998. The Adoption Agreements shall be limited in scope to the Kravis Center as set forth herein, and any of the six (6) outside presenter/employers identified above, if they choose to do so, may enter into their own comprehensive collective bargaining agreements with the Union. The use of the term "Employer" herein shall refer to those following entities which execute effective Adoption Agreements incorporating this Standard Agreement:
>
> | | |
> |---|---|
> | Palm Beach Opera | Ballet Florida |
> | Florida Philharmonic | Miami City Ballet |
> | P. T.G. Florida, Inc. | Palm Beach Pops |

[15] Kravis had been unwilling to treat Respondent as an infrequent presenter.

> CBA between the Raymond F. Kravis Center for the Performing Arts, Inc. and Local 623 I.A.T.S.E.
>
> If this is the case, I see no reason for a labor dispute or disagreement between Local 623 and the Palm Beach Pops.
>
> If this is your understanding please sign this letter and fax it back to me.

Respondent did not sign and return the Union's letter. Instead it faxed the Union a letter dated February 11, 1999 (GC Exh. 16):

> As you know, in our letter of November 10, 1998, we agreed to abide by the CBA standard agreement including the second addendum which is part of that agreement, relating to the payment of the prevailing wages and benefits as set forth in the adoption agreement.
>
> We reaffirm that agreement and agree to abide by it.

Here again, Respondent sets out the exact extent of its counteroffer.

In consideration of General Counsel's argument that Respondent agreed to the standard agreement effective from September 1, 1997, through June 30, 1998, I must keep in mind that Respondent never signed that contract. Moreover, Respondent resisted the Union's efforts to have the Kravis presenters agree to the contract by its refusal to sign one of the adoption agreements presented to it by the Union. Additionally, Respondent resisted union efforts to have it sign other documents such as the February 10 fax from the union president (GC Exh. 15). Therefore, I consider evidence of what the parties said or wrote in questioning whether there was a meeting of the minds regarding the standard agreement.

My determination is there was no meeting of the minds. Instead of agreeing to the standard agreement, Respondent consistently stated that it was agreeing only to pay prevailing wages and benefits with the understanding that is what the second addendum demanded. Moreover, Respondent continuously stated that it was making that agreement to pay prevailing wages and benefits in order to receive referrals from the Union. The full record and the above letters illustrate that was the totality of Respondent's offer (counteroffer) to the Union.

There was a conversation where the Union told Respondent that it felt Respondent had agreed to a contract. That occurred when Lisa Crawford spoke with John Dermody about her February 11 letter (GC Exh. 16). However, Crawford replied to Dermody that Respondent had never signed the agreement and all it had agreed was to pay prevailing wages and benefits.

That comment by Crawford showed that Respondent consistently took the same position throughout its discussions with the Union

On the other hand it is clear that the Union never agreed to Respondent's counteroffer. The above letters and the full record illustrate that the Union consistently rejected Respondent's efforts to have an agreement where the Union would provide labor in exchange for Respondent agreeing to pay prevailing wages and benefits. Actually, the Union did continue to provide labor from its hiring hall but it never did so because it felt there was an agreement for it to supply labor in exchange for Respondent paying prevailing wages and benefits.

Therefore, I find that Respondent and the Union never reached an agreement. *Shaw's Supermarkets,* 337 NLRB 499 (2002); cf. *Georgia Kraft Co. v. NLRB*, 696 F.2d 931 (11th Cir. 1983), where the court upheld the Board finding that the administrative law judge erred in holding there was no meeting of the minds.

In view of that finding and the fact there was no showing of other grounds for a bargaining obligation, I find Respondent had no obligation to bargain with the Union as alleged in the complaint. In view of that finding, I find Respondent did not violate Section 8(a)(5). Additionally, in view of the fact that Respondent had no duty to continue bargaining with the Union, I find that Respondent did not violate Section 8(a)(3) of the Act by illegally refusing to bargain because of union animus. Moreover, I find Respondent had no obligation to bargain with either Local 623 or its alleged successor, Local 500. Therefore, it is not necessary for me to consider whether Local 500 was properly created through a merger.

I recommend that the complaint be dismissed.