Ontario
Labour Relations
Board

Commission
des relations
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Our File Number / Numéro de dossier

0706-05-U
1015-05-U

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March 1, 2006

TO THE PARTIES LISTED ON APPENDIX "A"

Dear Sir/Madam:

Blue Man Toronto, LLC, v. Canadian Actors' Equity Association and Ken Burns and Susan Wallace

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Mr. Tony Ambrosi and Ms. Sharon Diamond, v. Canadian Actors' Equity Association and Susan Wallace and Henry Gauthier and Ken Burns and Allan Teichman and Donna Fletcher

I enclose herewith a copy of the Board's Decision dated February 27, 2006 in the above matters.

Sincerely,

Tim R. Parker
Registrar

TRP/al
Enclosure

APPENDIX "A"

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Attention: Ms. Susan Wallace
Executive Director

Canadian Actors' Equity Association
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Attention: Mr. Ken Burns
Senior Business Representative

International Alliance Of Theatrical Stage Employees And Motion Picture Machine Operators Of The United States And Canada, Theatrical Wardrobe Union, Local 822
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Attention: Ms. Cheryl Batulis
Business Agent

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Vice-President Internal

ONTARIO LABOUR RELATIONS BOARD

0706-05-U Blue Man Toronto, LLC, Applicant v. Canadian Actors' Equity Association and Ken Burns and Susan Wallace, Responding Parties.

1015-05-U Mr. Tony Ambrosi and Ms. Sharon Diamond, Applicants v. Canadian Actors' Equity Association and Susan Wallace and Henry Gauthier and Ken Burns and Allan Teichman and Donna Fletcher, Responding Parties.

BEFORE: Norm Jesin, Vice-Chair.

APPEARANCES: James G. Knight for Blue Man Toronto, LLC; D. Wray, H. Caley, Susan Wallace, Ken Burns, Henry Gauthier, Allan Teichman and Donna Fletcher for the responding parties; John Barrack, Tony Ambrosi and Sharon Diamond appearing for the individual applicants.

DECISION OF THE BOARD; February 27, 2006

INTRODUCTION AND BACKGROUND

1. These files are two applications filed pursuant to s. 96 of the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended (the "Act").

2. They arise from certain events surrounding the theatrical production of a show in Toronto known as The Blue Man Group. According to the applicants, the responding party Canadian Actors' Equity Association (hereinafter the "CAEA") spearheaded efforts by a coalition of unions to pressure the applicant Blue Man Toronto, LLC (hereinafter "BMT"), the producer of the show, to enter into collective agreements with the unions. Those efforts included a directive by CAEA that its members refrain from performing or auditioning for BMT until BMT signs the appropriate collective agreements.

3. The applicants Ambrosi and Diamond were members of CAEA at the time the applications were filed but they were on honourable withdrawal status. The by-laws of CAEA provide that members under withdrawal status do not pay dues and cannot participate in elections. Furthermore they are prohibited from accepting a contract for services within the jurisdiction of the CAEA. At the time of this application Ambrosi had been on withdrawal status for approximately five years whereas Diamond had withdrawn in April, 2005.

4. Both Ambrosi and Diamond had obtained employment with BMT in the spring of 2005. As a result, the individual responding parties are alleged to have pressured Ambrosi and Diamond into quitting their employment by harassing them and threatening them with charges under the CAEA by-laws. Ultimately, the CAEA charged both with violating the directive described above as well as the by-laws of the CAEA. A disciplinary hearing was scheduled to

deal with those charges and to determine if Ambrosi and Diamond should be expelled from membership of CAEA.

5. Board File No. 0706-05-U is an application by BMT alleging that the charges by CAEA together with other attempts by CAEA and the individual responding parties to pressure Ambrosi and Diamond to quit their employment with BMT, constituted unlawful intimidation and coercion designed to prevent Ambrosi and Diamond from exercising their right to be employed with BMT. BMT asserts that the responding parties are therefore in violation of s.76 of the Act.

6. Board File No. 1015-05-U is a similar application filed by Ambrosi and Diamond. However, these applicants further assert that the responding parties are also in violation of ss. 81, 83 and 85 of the Act. Sections 81 and 83 essentially prohibit anyone from calling, authorizing or threatening to call an unlawful strike. Section 85 prohibits a trade union from suspending, expelling or penalizing a member for refusing "to engage in ... a strike that is unlawful under the Act." BMT has intervened in support of this application.

7. At the outset of the hearing the responding parties raised three preliminary motions. First, they assert that BMT has no status either to file its own application or to participate in the application brought by Ambrosi and Diamond. It was the submission of the responding parties that this dispute was between the CAEA and its members and that BMT had no legal interest in the outcome.

8. The second motion was for dismissal of the applications on the ground that the facts alleged disclosed no *prima facie* case. The third motion brought in the alternative to the second was to dismiss the applications as being premature. It was asserted that the applicants should at least wait until the disciplinary hearings were completed and the outcome known before it could be determined whether there was any violation of the Act.

9. After hearing submissions on the status of BMT, I indicated that I would allow BMT to participate in the preliminary motions and that I would make a ruling on its status if necessary, before proceeding on the merits of the applications.

10. The motion for dismissal was heard over two hearing days. The parties made full and substantive submissions on the issues for determination.

11. The CAEA held its disciplinary proceedings between the first and second day of hearing and Ambrosi and Diamond were expelled from membership in CAEA. As a result, CAEA indicated that it is no longer pursuing its alternative motion that the applications are premature.

THE TEST FOR ESTABLISHING A *PRIMA FACIE* CASE

12. The Board's authority to dismiss an application for pleading no *prima facie* case is found in Rule 39.1 (formerly Rule 46) of the Board's Rules of Procedure. That Rule provides as follows:

> **39.1** Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all of the facts stated in the application are assumed to be true, the Board may dismiss the application

> without a hearing or consultation. In its decision, the Board will set out its reasons.

13. Counsel for the applicants correctly assert that the test to be met by a party asserting that there is no *prima facie* case to an application is a strict one. The Board's approach to such motions was well summarized by the Board in *International Union of Bricklayers and Allied Craftsmen,* [1999] O.L.R.D. No. 1492. In paragraph 2 of that decision the Board stated:

> 2. It is well settled that a motion to dismiss an application for disclosing no prima facie case for the relief requested must be based on the assumption that all of the allegations made in the application are true. Furthermore, a responding party seeking to have an application dismissed on this basis prior to the hearing must persuade the Board that even if all of the facts pleaded are true, there is no reasonable likelihood that the complaint can succeed. See Elizabeth Balanyk, [1987] OLRB Rep. Sept. 1121 at page 1123; J. Paiva Foods Limited, [1985] OLRB Rep. May 690; and International Association of Bridge, Structural and Ornamental Ironworkers, [1982] OLRB Rep. Feb. 223.

14. A number of Board decisions considering this issue have made reference to the Supreme Court Canada decision in *Hunt v. Carey Canada Inc.,* (1990), 74 D.L.R (4th) 321 (S.C.C.). At page 333 of that case the Court described the test for determining whether a *prima facie* case has been established as follows:

> Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.O., O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.

(Board decisions referencing this passage include *Brant (County),* [2000] OLRB Rep. November/December 1106 at para. 6; *Great Atlantic and Pacific Co. of Canada,* [2005] O.L.R.D. No. 2345, at para. 4).

15. As an aside, I would note that in *Hunt v. Carey Canada Inc.,* the Supreme Court of Canada was articulating a test for a court of general jurisdiction, rather than a specialized tribunal such as this Board. That is not to suggest that this Board should take a different approach than the courts. A specialized tribunal such as this Board may, at times, however, be better able to consider and determine whether an application pertaining to matters within its expertise, has any reasonable chance of success. Indeed, if the Board is satisfied that there is no reasonable likelihood of success, the application should be dismissed. This point was made by the Board in *International Union of Bricklayers and Allied Craftsmen* at paragraph 5 as follows:

> 5. Where, however, the Board is satisfied that the responding party bringing the prima facie motion has met the burden imposed, it is incumbent on the Board to dismiss the application, thereby conserving the limited resources of the Board for matters that do require a hearing. As Mr. Justice Grange said in Shaw v. McLeod, (1982), 35 O.R. (2d) 641:

> "I concede that on this motion if, after a careful review of the law, the Court determines that he [the Plaintiff] cannot possibly succeed, then his action should be mercifully dispatched."

16. The question to be determined, then, is whether it can be said that the facts pleaded in the applications disclose any reasonable likelihood that the applications will succeed. If they do then the applications must be allowed to proceed and the motion must be dismissed. On the other hand if there is no reasonable likelihood that the applications can succeed, they will be dismissed.

ALLEGED VIOLATION OF S.76

17. Section 76 of the Act provides as follows:

> **76.** No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

18. Before s.76 can be invoked the pleadings must establish some element of coercion or intimidation. In addition, they must establish that such coercion is being utilized to prevent the exercise of a protected right under the Act.

19. The responding parties assert, *inter alia,* that the determination of whether to suspend or expel an individual from membership is an internal union matter not subject to regulation by this section. They further assert the facts alleged do not establish that they unlawfully prevented the applicants from exercising rights protected by the Act. The applicants counter that Ambrosi and Diamond have a protected right to work for BMT and that the responding parties are seeking by coercion and intimidation to prevent Ambrosi and Diamond from exercising that right.

20. The Board has generally been reluctant to regulate the internal affairs of a union except where such regulation is specifically authorized in the Act. (See for example, *Corporation of the City of Brampton,* [1995] O.L.R.D. No. 3013, at paragraph 5. See also s. 149 of the Act, which expressly authorises the Board to regulate attempts by a parent union to assume supervision or control over a local union in the construction industry.)

21. It is not unusual for trade unions in some industries to attempt to control the supply of labour by restricting the right of their members from working for employers not in contractual relations with the union. Such a practice is most prevalent in the construction industry but also exists in other industries. The ability of unions to make such a restriction a condition of membership is nowhere prohibited in the Act. Indeed s.51(2) of the Act prohibits a union from requiring an employer to discharge an employee for being expelled or suspended from membership in specified circumstances. But the Act does not expressly prohibit the expulsion or suspension from membership in those or any other circumstances.

22. The applicants assert that this case is not about the regulation of internal union affairs but about intimidating Ambrosi and Diamond into assisting the CAEA campaign against BMT. They rely on a number of cases including *Centro Mechanical Inc.,* [1996] O.L.R.D. No. 3178.

23. In *Centro Mechanical Inc.*, the Board found a union to be in violation of s.76, for charging members employed by a non-union employer for not signing membership cards in support of an attempt to certify the employer. In that case the union sought to fine its members for refusing to sign membership cards on behalf of an affiliated local. At paragraph 54 of its decision the Board noted the union's motivation was to "coerce the employees into participating and helping the applicant in its attempt to certify Centro". Of course it should be noted that the right to refrain from becoming a member of a union is expressly protected in s.76.

24. In *John Craddock*, [1987] OLRB Rep. Dec. 1488, the Board had to consider a complaint similar to this one in the context of a dispute between two unions at Ontario Hydro. In that case the applicants were members of a construction industry union. The applicants accepted employment with Ontario Hydro, but in the industrial bargaining unit represented by another union. At some point the construction unions acted to prevent an erosion of their work to the industrial unit and directed the applicants to quit their employment in the industrial unit. The applicants were told that if they did not quit they would be charged under the union by-laws. The applicants refused to obey the directive. They were ultimately fined and prohibited from being placed on the "out of work referral list". As a result the applicants alleged that the union was in violation of a number of sections of the Act including s.76 [then s.70].

25. In rejecting the claim under s.76, the Board considered the relationship of the freedom to join the union as expressed in s.5 [then s.3] with s.76 and stated at paragraph 18.

> 18. In *Deborah Brown*, [1976] OLRB Rep. Feb. 4, and consistently since then, the Board has held that section 3 of the Act is a declaration of rights and by itself does not create an offence under the Act. Although he did not specifically link the two in his argument, Craddock relied on both section 3 and section 70 of the Act when arguing that the respondent's conduct was based on a desire to prevent the complainants from continuing to be CUPE members. In reviewing the respondent's conduct as a whole, we are satisfied that its conduct did not breach sections 3 and 70 of the Act. The respondent's actions which had an impact on the complainants were not motivated by a desire to interfere with the complainant's rights to select the bargaining agent of their choice. The respondent's conduct was based on a concern relating to the work the complainants were performing for Hydro outside of the hiring hall system. The respondent's decision not to permit them to continue to perform the Hydro work only incidentally impacts on the complainants' rights to select the union of their choice. The respondent did not attempt to interfere with CUPE's representation of the complainants or to prevent them from becoming CUPE members. The complainants are members of the respondent and, as such, have obligations as members of U.A. If the respondent takes legitimate steps to ensure that its members adhere to its objectives, its conduct would not run counter to sections 3 and 70 even if it results in some members ceasing to work in a particular bargaining unit in which they were represented by another trade union.

26. The facts pleaded in this case are much closer to those in *John Craddock* than in cases such as *Centro*. The responding parties are not seeking to coerce the applicant into joining a union, as was the case in *Centro*. Nor are they interfering with the ability of the applicants from exercising any protected right under the Act. Like the complainants in *John Craddock*, the applicants in this have an obligation to follow the legitimate rules of the CAEA. In this case Ambrosi and Diamond may certainly work for any employer of their choice. But as the Board suggested in *John Craddock*, a union may legitimately seek to restrict its members from working in certain circumstances in an attempt to secure work opportunities for its membership.

Employees cannot expect to be able to work for an employer contrary to the legitimate rules and/or directives of their union and to maintain membership with that union at the same time. The Act neither provides for nor protects a right to both work and maintain membership in those circumstances.

27. It is my determination that the claim under s.76 cannot succeed and is therefore dismissed.

ALLEGED VIOLATION OF SS. 81, 83 AND 85

28. Sections 81, 83 and 85 of the Act provide as follows:

> **81.** No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.
>
> ***
>
> **83.** (1) No person shall do any act if the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.
>
> (2) Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lock-out.
>
> ***
>
> **85.** No trade union shall suspend, expel or penalize in any way a member because the member has refused to engage in or to continue to engage in a strike that is unlawful under this Act.

29. The applicants submit that by pressuring Ambrosi and Diamond to quit their employment with BMT in the circumstances described above, the responding parties called, authorized and/or attempted to cause an unlawful strike contrary to ss.81 and 83 of the Act. In addition, the applicants assert that by charging Ambrosi and Diamond and removing them from membership, the responding parties expelled and/or penalized them for refusing to engage in an unlawful strike contrary to s.85 of the Act.

30. The definition of the term "strike" is set out in s. 1(1) of the Act as follows:

> "strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output.

31. I first point out that the CAEA's directive was, in essence, a directive that its members not accept employment with BMT. As such it was directed not to employees of BMT but to its own members. In *Niagara Catholic District School Board,* [1998] OLRB Rep. November/December 995, the Board found that a refusal to become an employee cannot meet the definition of "strike" contained in the Act. In that case the union had advised its members not to accept employment with various school boards that had not yet reached collective agreements with the union. The Board determined that members who were not yet employed could not be on

strike and that the "boycott" was therefore not a call for a strike. Similarly, the CAEA directive in this case is not a call for a "strike".

32. Nevertheless, the applicants assert that the impugned conduct of the responding parties went far beyond the directive. The applicants contend that by pressuring Ambrosi and Diamond to quit, they essentially sought to induce them to engage in a strike. Naturally, the responding parties submit, no strike was called, threatened, authorized or took place and that there was no violation of any of the sections relied on by the applicants.

33. In order to succeed the applicants must establish that the "quit" being urged upon the applicants would, if carried out, have amounted to a strike. In the words of s.1(1), the applicants would have to first establish that in quitting, Ambrosi and Diamond ceased working "in combination or in concert ... in accordance with a common understanding ... designed to restrict or limit output". In my view this would be virtually impossible to establish on a hypothetical basis. As I have already noted, no strike at BMT has taken place. According to the pleadings, the applicants were not being asked to quit on conditions. Nor were they asked to make their quit revocable. Regardless of whether such a quit could ever amount to a strike, it could not be inferred in these circumstances that the necessary elements of a "strike" were made out.

34. For example, in *Unilux Boiler Corp.*, [2005] OLRB Rep. June, 1, the union was engaged in a legal strike with the employer. The union proceeded to picket employees who were not in the bargaining unit and who were not represented by the union. Some of those non-union employees refused to cross the picket line. The employer alleged that the union had caused those employees to engage in an illegal strike. The union's position was that those non-union employees who had not crossed the picket line were not on strike within the meaning of the Act. In its decision the Board noted that whereas it could be inferred that employees represented by a union would act in concert with a common understanding with the picketers, the same could not be inferred from the refusal to work of non-union employees. (see especially paragraphs 9-20). Although the facts in *Unilux Boiler Corp.* are different than the facts before me, the unusual circumstances of this case would certainly require evidence to establish that a quit was carried on with a common understanding. As in *Unilux Boiler Corp.*, the pleadings do not assert, nor could the evidence establish, that this hypothetical quit would have been carried out in that way. I therefore conclude that the applicants could not make out that they would have been engaged in a strike had they quit their employment.

35. There are additional reasons why this application should not proceed in my view. The Board has a discretion as to whether to inquire into any s.96 complaint. In this case Ambrosi and Diamond never quit. Even if such quit would amount to a strike, that strike never happened. The Board would generally avoid determining an allegation that a strike has been authorized where that determination is not necessary to prevent a strike from taking place. In my view, it would not be necessary or appropriate to make that determination in the circumstances of this case. I would therefore not be inclined to grant relief pursuant to ss. 81 or 83 of the Act.

36. With regard to s.85, I would note that in this case the CAEA charges against Ambrosi and Diamond are, on their face, in response to the alleged violation of the CAEA directive. In addition, the CAEA decision expelling Ambrosi and Diamond from membership explicitly states they were in violation of various by-laws for "having accepted work from the Blue Man Group without the benefit of a CAEA contract". According to the charges and the hearing decision, Ambrosi and Diamond created the difficulty by accepting work with BMT, in disregard of the CAEA directive. Neither the directive, nor the charges on their face disclose any violation of the

Act. It cannot be that efforts to seek compliance with the directive become unlawful only after Ambrosi and Diamond accepted employment in contravention of the otherwise lawful directive.

37. For these reasons the claim pursuant to ss. 81, 83 and 85 of the Act is also dismissed

38. I acknowledge that the pleadings assert that the applicants were treated differently than other members who had worked for a non-union employer. That is a matter that could have been put before the hearing committee dealing with the charges. I would also note that if Ambrosi and Diamond take issue with how the hearing committee interpreted or administered the CAEA constitution, that is a matter that may be challenged in another forum. The internal administration of a union constitution does not fall within the purview of ss. 81, 83 and 85 of the Act.

CONCLUSION

39. In conclusion, it is my determination to allow the motion of the responding parties and to dismiss both applications in these matters. In light of the foregoing, it is not necessary to deal with the status of BMT to participate in these proceedings.

"Norm Jesin"
for the Board