

May 21, 2007

LETTER ORDER

Dennis W. Finch
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1506 Mountain View Road, Suite 101
Rapid City, SD 57702-4349

Karie A. Price
Assistant City Attorney
300 Sixth Street
Rapid City, SD 57701-4140

RE: HF No. 7 U, 2006/07 – Rushmore Plaza Civic Center Board v. Local 731
International Alliance of Theatrical Stage Employees

Dear Mr. Finch and Ms. Price:

I am in receipt of Respondent's Motion to Dismiss and Petitioner's Response to Motion to Dismiss. The Department had for its consideration the Affidavits of Brian Maliske, Cathy Druckery, Mary Allison, and Keith L'Esperance, in addition to a Notice of Entry of Temporary Restraining Order and a certified copy of the Order.

Respondent moves the Department for dismissal based upon two grounds. First, Respondent argues that the Department lacks jurisdiction over this matter because stage employees are excluded from SDCL Chapter 3-18 pursuant to SDCL 3-18-1(4), which provides in relevant part:

The words "public employees" as used in this chapter shall mean any person holding a position by appointment or employment in the government of the state of South Dakota or in the government of any one or more of the political subdivisions thereof, or in the service of the public schools, or in the service of any authority, commission, or board, or any other branch of the public service. The term does not include:

- (4) Temporary public employees employed for a period of four months or less[.]

Petitioner argues that the Rushmore Plaza Civic Center is a municipally owned auditorium and stage employees are “public employees” because they are employees of this municipality. Petitioner’s argument is persuasive. First, the City of Rapid City is a first class municipality organized under the laws of the State of South Dakota. Statutory authority provides the City with authority to construct, operate, and maintain the Civic Center. SDCL 9-52-1. Additionally, statutory authority provides the City with the power to create an appointive board for the purpose of managing municipal auditoriums. SDCL 9-52-2. The City of Rapid City has created such board by City Ordinance RCMC Chapter 2.76.

Second, the Union has been certified by the South Dakota Department of Labor as the bargaining agent for stage employees at the Rushmore Plaza Civic Center, pursuant to SDCL 3-18-4. The Union and the Board have had collective bargaining agreements in place for more than 20 years. In further support of this finding, each stage employee represented by Respondent is required to complete an application of employment. Once hired, the Board pays wages to each stage employee based on the prior collective bargaining agreement, as well as the employer’s share of the social security taxes, Medicare taxes, and worker’s compensation coverage. The Board also withholds Union dues from each Union member’s paycheck in accordance with the check-off form signed by each stage employee.

Respondent stage employees are not “temporary public employees employed for a period of four months or less.” The issue of whether stage employees are temporary public employees under SDCL 3-18-1(4) came before the Honorable Judge Delaney, Seventh Judicial Circuit Court, when Petitioner filed a Motion for Temporary Restraining Order. The Court held that the individual members are public employees and are not excluded from SDCL Chapter 3-18 under the temporary employees exception. Although the individual stage employees are called to work on an irregular basis, they are part-time workers over a multi-year period, not temporary workers for less than four months. The Union is an employee group hired in multi-year segments. Under the most recent collective bargaining agreement, stage employees have been employed by the Board for two years.

Respondent’s first argument for dismissal is rejected. Respondents are a Union, duly certified under SDCL Chapter 3-18 and its members are public employees, not exempted from the Department’s jurisdiction.

Respondent’s second argument for dismissal is that the complaint asserted by Petitioner is not timely pursuant to SDCL 3-18-3.4. SDCL 3-18-3.4 provides:

Any complaint brought under the provisions of 3-18-3.1 and 3-18-3.2 shall be filed with the Department of Labor within sixty days after the alleged commission

of an unfair labor practice occurs or within sixty days after the complainant should have know of the offense.

The parties entered into a collective bargaining agreement pursuant to the provisions of SDCL 3-18-8 on May 5, 2004. That agreement expired on December 31, 2006. Negotiations for a new collective bargaining agreement between the two parties took place at the Rushmore Plaza Civic Center on October 13, 2006, October 27, 2006, November 3, 2006, December 15, 2006, and December 20, 2006.

At the conclusion of the negotiations on December 20, 2006, Petitioner alleges that representatives of Respondent Union distributed a typewritten handout containing provisions it described as "non-negotiable" provisions. The Union represented that its members would not report to work after December 31, 2006, unless the Board accepted in full all of the provisions it deemed non-negotiable.

On January 6, 2007, members of the Union failed to report to work as scheduled. On January 10, 2007, Judge Delaney granted the Board's Motion for Temporary Restraining Order. Judge Delaney made Findings of Fact and Conclusions of Law, concluding that:

1. The Court has jurisdiction over the parties and the subject matter.
2. The individual members of the Defendant are public employees as defined in SDCL 3-18-1.
3. The individual members of the Defendant are not temporary employees subject to the exception contained in SDCL 3-18-1(4).
4. The refusal of the Defendant to answer calls for stagehands constitutes a strike by public employees as defined by SDCL 3-18-9.
5. SDCL 3-18-10 prohibits public employees from striking.
6. SDCL 3-18-14 permits this court to enjoin the Defendant from continuing to strike.
7. The Plaintiff's motion for temporary restraining order to prevent the Defendant Union and its members from continuing to refuse to answer calls for stagehands at the Rushmore Plaza Civic Center should be granted.

On March 8, 2007, Petitioner filed its Petition for Hearing on Unfair Labor Practice. The issue of whether or not Respondent has engaged in an unlawful strike against Petitioner is a matter of res judicata. Whether this is an unfair labor practice and what remedy should be applied is a question within the jurisdiction of the Department of Labor. Petitioner knew on January 10, 2007, that Respondent had engaged in an unlawful strike and therefore, by filing on March 8, 2007, Petitioner met the sixty-day deadline to file its complaint of unfair labor practice.

Whether Respondent's actions on December 20, 2006 and the continued refusal to negotiate without declaring impasse is an unfair labor practice is in question. Petitioner knew on December 20, 2006, that Respondent was refusing to negotiate certain items

to be included in the collective bargaining agreement. Respondent did not declare impasse and; instead, threatened to strike and then followed through with that threat on January 6, 2007. Petitioner did not file its Petition for Hearing on Unfair Labor Practice until March 8, 2007, exactly sixty days after January 6, 2007, the day Respondent carried out its threat to strike.

Regarding Petitioner's argument that the December 20, 2006, action taken by Respondent during negotiations is an unfair labor practice, Petitioner did not meet the deadline provided by SDCL 3-18-3.4. However, it does not appear from this record that impasse has been declared. The parties are still under an obligation to negotiate in good faith towards a collective bargaining agreement until impasse is declared.

Based upon the above findings, Respondent's Motion to Dismiss is granted in part and denied in part. Petitioner met the statute of limitations deadline on each allegation of unfair labor practice except the allegation that the action taken by Respondent on December 20, 2006 was an unfair labor practice. However, that action continues to this day because no impasse has been declared and the parties continue to be under the obligation to negotiate.

This letter shall constitute the Department's Order. The parties are directed to contact the Department in writing when ready for hearing.

Sincerely,

Heather E. Covey
Administrative Law Judge