The Labour Relations Board
Saskatchewan

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, LOCAL 295, Applicant v. THE GLOBE THEATRE SOCIETY, Respondent

LRB File No. 035-11; September 27, 2011
Vice-Chairperson, Steven Schiefner; Members: Donna Ottenson and Mick Grainger

For the Applicant Union: Ms. Heather Robertson
For the Respondent Employer: Ms. Megan McCreary

Employees – Exclusion from bargaining unit – Employer argued that five production heads ought to be excluded from scope of proposed bargaining unit – Board notes that, while production heads exercise certain functions of managerial character, Board not satisfied that positions ought to be excluded from bargaining unit – Board not satisfied that managerial functions were primary responsibility of positions – Board concludes that excluding production heads would unnecessarily prevent representation for incumbents.

Certification – Practice and Procedure - Board called upon to determine whether or not certain employees were eligible to participate in the representation vote – Union was not seeking to represent all employees of employer, only employees in one department - Disputed employees were working for employer at time of union's application but were not worked within the scope of the bargaining unit at time of certification application – Board concludes that disputed employee's primary relationship with employer was not within the scope of the bargaining unit - Board not satisfied that the disputed employees had more than tenuous relationship with bargaining unit – Disputed employee not eligible to participate in the representation question.

The Trade Union Act, ss. 2(f)(i)(A)

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson**: On March 4, 2011, the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 295 (the "Union") applied to the Saskatchewan Labour Relations Board (the "Board") to be designated as the certified bargaining agent for a unit of production employees of the Globe Theatre Society (the "Employer") in

connection with the operation of the Globe Theatre. The Globe Theatre is a regional live theatre operating in the City of Regina (the "theatre").

[2] In its application, the Union sought to represent the following unit of employees:

> *All production employees employed by the Globe Theatre in the City of Regina, including the Head of Scenic Carpentry, Head of Props, Head of Wardrobe, Head of Lights, Head of Sound, production assistants, seamstresses/cutters, stage carpenters, and all stage hands and excluding the Artistic Director, Executive Director and Director of Production.*

[3] In its application, the Union estimated that there were ten (10) employees in the bargaining unit.

[4] The Employer's Reply placed three (3) primary issues in dispute, namely; the composition of the bargaining unit (i.e.: whether or not certain positions ought to be excluded from the unit on the basis that they performed functions of a managerial character); the composition of the voters list (i.e.: whether or not certain employees not working in the bargaining unit at the time of the Union's application ought to be included in the representation vote); and whether or not the Union filed sufficient evidence of support with its certification application to satisfy the requirements of s.6 of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*").

[5] A pre-hearing representation vote was conducted on April 8, 2011, with the ballot box being sealed following the conduct of the vote pending further direction from this Board. As the composition of the voters list was at issue in these proceedings, all ballots cast in the representation vote were "double enveloped".

[6] The Union's application was heard over two (2) days, on August 30 and 31, 2011, in Regina, Saskatchewan. The Employer called Mr. Andrew P. North, the theatre's Executive Director. The Union called Mr. Bruce B. Haines, the Union's International Representative responsible for Western Canada, Ms. Charity Gadica (nee: Martin), the theatre's Head of Wardrobe, and Mr. Paul Roth, the theatre's Head of Scenic Carpentry.

[7] The parties were granted leave to file supplementary arguments on or before September 14, 2011 with respect to a topic that arose late in the hearing; which date shall represent the last day of hearing pursuant to s.21.1 of *The Trade Union Act*, R.S.S. c.T-17 (the "*Act*"). In addition, the parties filed written briefs of law at the close of the hearing, which we have read and for which we are thankful.

Facts:

[8] Much of the evidence relevant to these proceedings was not in dispute. What was in dispute was the labour relations significance of that evidence.

[9] The Employer is a non-profit theatre organization run by a volunteer Board of Directors. The theatre annually presents a season of six (6) or seven (7) live theatrical presentations.

[10] While the theatre had a number of departments, including front of house, production, theatre school, marketing, and administration, the Union was only seeking to represent employees in the Production Department. The Union has historically tended to seek certification on a craft basis and holds other certification involving employees working in the production side of other regional live theatres in Western Canada. Employees working in the production side of live theatre generally fall within the crafts that the Union prefers to represent.

[11] In the Production Department, the Employer had two (2) full-time employees, namely: the Director of Production and the Technical Director. Both of these positions were agreed by the parties to fall within the management exception and should not be included within the scope of the bargaining unit.

[12] As appeared to be customary in this industry, the Production Department also employed five (5) production heads, namely; the Head of Wardrobe, the Head of Properties (Props), the Head of Scenic Carpentry, the Head of Lighting, and the Head of Sound. The five (5) production heads are hired by the theatre for a 35-40 week season, with incumbents often returning from season to season (i.e.: year after year). The status of the five (5) production heads was in dispute between the parties; with the Employer arguing these positions performed functions of a managerial character and the Union arguing that they ought more properly to fall within the scope of their bargaining unit.

[13] The balance of the employees employed in the Production Department were hired on a “casual” or “contract” basis for a particular show or partial run of shows. These positions included production assistants, wardrobe cutters, wardrobe stitchers, stage carpenters, prop builders, lighting technicians, and sound technicians. It was agreed by the parties that all of these positions fell within the scope of the bargaining unit.

[14] It should be noted that a number of other employees were employed or retained by the Employer and worked in or with the Production Department, including Set Designers, Costume Designers, Lighting Designers, Sound Designers and Projection Designers. However, it was agreed by the parties that these positions ought to be excluded from the bargaining unit because they were represented[1] by the Associated Designers of Canada.

[15] Work at the theatre, particularly in the Production Department, appeared to fluctuate dramatically during the year as each show is produced and then performed. Depending upon the type of show being presented, both the number and type of employees varied significantly. Some shows involve elaborate stage modification, requiring skilled scenic carpenters. Some shows have many properties, requiring prop builders, including craftsmen and women with unique skills. Some shows have larger wardrobe requirements, requiring more cutters and stitchers. All shows have lighting and sound requirements; some more complex than others, requiring more help to install and refine. What was clear from the evidence was that, during the production phase of a show, many skilled hands were involved. Each craft area (carpentry, props, wardrobe, etc.) utilized a pool of casual employees known to, and often trained by, the theatre. To assist the Herculean effort of preparing the properties and wardrobe requirements in advance of a show, then tearing down one (1) show and preparing the stage, sound and lighting for the next production (much of which must be accomplished during the limited time between shows), the theatre also utilized employees from other departments.

[16] Finding and retaining workers with the unique skill required for theatrical productions appeared to be a challenge for the theatre, as it presumably was for other regional theatres. The skills required to work in live theatre are somewhat unique and the volume of work is unpredictable. As a result, the theatre operated its own theatre school teaching a variety of theatrical crafts and bringing in instructors with particular skills, ranging from costume cutting, to

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[1] By means of a voluntary recognition.

prop making, to workshops on millinery skills (hat making). Training workshops were offered to both the casual employees within the Production Department, as well as other employees working in other departments for the Employer; thus increasing the available pool of skilled individuals that could be called upon by the Production Department depending on the demands of any particular show.

[17] As the status of the five (5) production heads were in dispute, this Board heard considerable evidence as to the roles and responsibilities of these positions, the labour relations authority delegated to the incumbents, as well examples of the practical application of that authority in the past. All of the production heads reported to the Director of Production. The Head of Scenic Carpentry (as the name would imply) was responsible for coordinating, building and installing the scenic elements required for all of the shows produced and/or presented by the theatre. The Head of Properties was responsible for coordinating, building and/or acquiring the props required for all of the shows produced and/or presented by the theatre. The Head of Wardrobe was responsible for coordinating and implementing the costuming elements for all of the theatre's shows. The Heads of Sound and Lighting were each responsible for coordinating the sound and lighting elements of the respective shows produced and/or presented by the theatre. All of the production heads were required to work closely with the directors and designers for each of the shows to realize the artistic goal or vision for that particular show and were required to operate within both financial and time constraints.

[18] It was apparent that the Director of Production had delegated sufficient authority to each of the production heads to hire the casual staff they deemed appropriate and necessary to complete the requirements of any given show for their respective departments. The production heads were allowed to select the candidates they deemed most appropriate based on their own selection criteria. The primary constraint placed on the production heads by the Director of Production was to operate within their allotted budget for a particular show. Budgets for each show were determined in advance (sometimes determined in advance of the production heads being hired for that season) by the Artistic Director, Director of Production and Executive Director, in consultation with set, costume and other designers. While the production heads played a role in refining the production budgets for their respective areas, their primary responsibility was to work within their assigned budgets. While undoubtedly their input was taken into consideration, final decisions as to the movement or reallocation of show budgets rested with those above the production heads.

[19] The Head of Wardrobe tended to employ the most casual employees of the production heads and tended to do so with the most consistency and for the longest durations. On the other extreme, the sound department was an area that tended to require the least number of casual employees. By way of example, over the past three (3) years, the wardrobe department employed twenty-two (22) different individuals; the lighting department employed eighteen (18) different individuals; the properties department employed thirteen (13) different individuals; the carpentry department employed seven (7) different individuals; and the sound department only employed one (1) employee over that period. It should be noted that many of these individuals not only worked in more than one production departments but many also worked in other areas of the theatre, including the theatre school (as in the case of the Director of the Theatre School and an instructor) and the front of house (as in the case of a manager and a bartender). It would be a more accurate description to say that the employees from other departments tended to assist the Production Department during times of need (i.e.: shows with many properties or complex lighting requirements), with most obtaining the majority of their hours of work from other departments. What was apparent to the Board was that, during the production phase of a show, everyone that could help, did help (to get the show ready to be performed).

[20] While the production heads clearly had authority to direct the work of the casual employees within their respective department, it was not clear that the production heads had the authority to discipline or terminate such employees. On the other hand, because casual employees tended to work on one (1) show at a time and because the production heads had the discretion as to whom they would hire (and re-hire), the production heads tended to have numerous opportunities throughout the year to make adjustments to the workforce within their respective departments. Examples were cited were a production head had decided not to hire someone back because the head had become dissatisfied with that person's performance or conduct at work place.

[21] Other than the Head of Wardrobe, all of the production heads tended to work with the tools of their craft and spend the majority of their time either building things, as in the case of the Heads of Carpentry and Props; or installing, focusing, and operating things, as in the case of the Heads of Lighting and Sound. Ms. Gadica, the Head of Wardrobe, testified that she spent little time cutting or sewing costumes; leaving these tasks to her staff. Ms. Gadica testified that

the volume of work required in her department prevented her from spending much time working directly on the wardrobe elements required by the theatre.

[22] For the most part, the compensation to be paid and other terms and conditions of employment for casual employees were not determined by the production heads. Mr. North, the theatre's Executive Director, testified that research into the compensation and other benefits provided by other regional theatres to the production staff was conducted by either himself or the Director of Production. The theatre appeared to have standard wages for most production positions, with small variations based on experience. While the Executive Director testified that the production heads had authority to offer wage and benefits above the standard, most wages paid to causal staff in the production department appeared to be standardized. On the few occasions when salary increased had been deemed appropriate by a production head, those increased wages were only implemented after consultation with the Director of Production.

[23] At the time the Union's application was filed with the Board (on March 4, 2011), as well as when the representation vote was conducted (on April 8, 2011), there were six (6) employees working for the Employer that during the preceding season had also worked in the Production Department. None of these six (6) employees (i.e.: the "disputed employees") were working in the Production Department in March or April of 2011. In fact, none of the disputed employees had worked in the Production Department during the three (3) months preceding the representation vote. All of the disputed employees had worked as prop builders during the 2010/2011 season. Most worked in October and November of 2010, with one (1) also working in December of that year. The last that any of these individuals worked in the Production Department was December 24, 2010 for the production of "Honk".

[24] The disputed employees included Ms. Shauna Dunn, who was the Director of the Theatre School, but who also worked as a prop builder for 12.5 hours in October, 2010 and 56 hours in November of 2010; Ms. Ester Garlock, who was the Stage Manager, but who also worked as a prop builder for 31.5 hours in November, 2010 and 69.5 hours in December of 2010; Ms. Lucy Hill, who was a Theatre School Instructor and an Actor, but who also worked as a prop builder for 18.75 hours in October, 2010 and for 50.25 hours in November, 2010; Ms. Jodi Norman, who was the Front of House Manager, but who also worked as prop building for 35.75 hours in November, 2010; and Ms. Melanie Vovchuk, who was a bartender and Front of House Manager, but who also worked as a prop builder for 14.5 hours in November, 2010.

[25] During the preceding seven (7) months, Ms. Dunn worked approximately 7% of her time in the Production Department; Ms. Garlock worked approximately 19.5% of her time in the Production Department; Ms. Hill worked approximately 16% of her time in the Production Department; Ms. Norman worked approximately 11% of her time in the Production Department; and Ms. Vovchuk worked approximately 2% of her time in the Production Department. While working in the Production Department, the disputed employees were paid wage commensurate with the tasks they were performing at that time (i.e.: prop building). Of particular significance, the wages paid to Ms. Dunn, Ms. Hill, and Ms. Vovchuk, while they worked in the Production Department, were significantly less then when they were working in other departments.

[26] Finally, Mr. North testified that the theatre had invested training in the disputed employees in prop building and other areas because these individuals had expressed an interest in the production side of the theatre's operations. Mr. North testified that the Employer intended to utilize the disputed employees again in the Production Department, as and when necessary in the future.

Argument of the Parties:

[27] The Union argued that the unit of employees that it applied for was appropriate for collective bargaining and that any employees who were not working in the production department at the time that it filed its certification application (and the vote was conducted) should not participate in the representative question.

[28] With respect to the status of the production heads, the Union argued that these positions were "employees" within the meaning of the *Act* and that they should not be excluded on the basis of the managerial exemption. Firstly, the Union argued that the ability to discipline, discharge and influence labour relations ought to be the primary criteria for determining managerial exclusions. The Union argued that, although the production heads had the ability to hire casual employees within their respective departments, this authority alone was insufficient to warrant exclusion of the production heads. In this regard, the Union relied upon this Board's decision in *Service Employees International Union, Local 333 v. Lutheran Sunset Home Corp. (Lutheran Riverside Terrace)*, [2002] Sask. L.R.B.R. 685, LRB File No. 184-02, as an example of a similar fact situation wherein the Board determined that a position of "hostess/server supervisor", who had authority to hire staff, should not be excluded from a bargaining unit.

[29] Secondly, the Union noted that this Board has historically applied the managerial exclusion as narrowly as possible to avoid unnecessarily splitting and weakening the bargaining unit and the Union argued that the Board to do so in these circumstances. Thirdly, the Union argued that it was unlikely that the production heads would be involved in collective bargaining or grievance resolution. Finally, the Union argued that the limited managerial functions performed by the production heads were not sufficient to create an insoluble conflict of interest with other employees in the bargaining unit.

[30] With respect to the disputed employees on the voter's list, the Union argued that, while these employees continued to work for the Employer, none of them had worked in the production department during the preceding three (3) months and thus they did not have a sufficiently tangible connection or interest in the bargaining unit to justify their participation in the representation question. In addition, the Union noted that all of the disputed employees worked outside of the Production Department for the majority of their time. The Union argued that the Board should look to its jurisprudence in the construction sector for direction in dealing with employees that work in multiple crafts. In this regard, the Union relied upon the decision of this Board in *International Union of Operating Engineers, Hoisting and Portable and Stationary, Local 870 v. K.A.C.R. (A Joint Venture), et. al.*, [1983] Sept. Sask. Labour Rep. 37, LRB File No. 106-83, wherein the Board concluded that, where employees are engaged in multiple crafts, the Board will look to the craft where they were employed for the majority of their time as the one governing their status on an application for certification. The Union also cited the cases of *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Dominion Bridge Inc.*, [1998] Sask. L.R.B.R. 365, LRB File No. 302-97, and *International Union of Operating Engineers, Hoisting and Portable and Stationary, Local 870 v. Flynn Bros. Construction Inc.*, [1999] Sask. L.R.B.R. 73, LRB File No. 182-98, as other examples wherein the Board had relied upon the "majority of time" test to determine whether or not persons employed in multiple crafts were eligible to participate in the representative question on a certification application.

[31] In summary, the Union argued that the "all production employee" unit that it applied for was appropriate for collective bargaining in this particular workplace. The Union asked that all five (5) of the Production Heads be included within the scope of the bargaining unit. Finally, the Union asked that none of the ballots of the six (6) disputed employees should be counted in determining whether or not the Union enjoys the support of the majority of employees in the bargaining unit.

[32] The Employer, on the other hand, took the contrary position on each of these issues. For example, the Employer took the position that the five (5) production heads should not be included in the proposed bargaining unit on the basis that they perform function of a managerial character. The Employer argued that each of the production heads were responsible for supervising all of the casual employees within their respective departments; that they were authorized to independently hired and re-hire the requisite casual employees within their respective departments; and that the evidence demonstrated that the department heads had the practical capacity to fire and discipline their staff. The Employer also argued that the production heads performed a valuable cost-analysis function and that they had absolute discretion in the administration of the budgets for their respective departments. Based on these responsibilities, the Employer argued that placing the production heads in the bargaining unit would inevitably result in the kind of insoluble conflict which this Board has historically sought to avoid. In this regard, the Employer relied upon this Board's decisions in *City of Regina v. Canadian Union of Public Employees, Local 21 and Regina Civic Middle Management Association*, [1995] 3rd Quarter Sask. Labour Rep. 153, LRB File No. 268-94; *Professional Institute of Public Service of Canada. v. Executive Branch of the Government of Saskatchewan and Saskatchewan Government Employees' Union*, [1997] Sask. L.R.B.R. 530, LRB File No. 018-97; and *The Saskatchewan Institute of Applied Science and Technology v. The Saskatchewan Government and General Employees' Union*, 2009 CanLii 72366, LRB File No. 079-06.

[33] With respect to the disputed employees, the Employer argued that these employees were working for the Employer on the date of the Union's application and on the date the representation vote was conducted and that these employees had a tangible and continuing connection with the Production Department. In this regard, the Employer relied on the decision of this Board in *Service Employees International Union, Local 333 v. Bethany Pioneer Village Inc.*, [2007] Sask. L.R.B.R. 611, LRB File No. 036-06. The Employer argued that the nature of theatre work was such that employees are hired for a particular show or project but that there may well be weeks, sometimes months, of time between available work depending on the production schedule. The Employer noted that the employees working in the Production Department are hired according to their proficiency and experience in particular areas and that they routinely come and go depending on the stage of production. The Employer argued that, even though the tenure of employment of these employees in the Production Department is intermittent, they nonetheless have a legitimate interest in collective bargaining with respect to the employees in that department. In this regard, the Employer relied on the companion

decisions of this Board in *Service Employees International Union, Local 299 v. Vision Security and Investigation Inc.* [2000] Sask. L.R.B.R. 121, LRB File No. 229-99; and *Service Employees International Union, Local 299 v. Vision Security and Investigation Inc.* [2000] Sask. L.R.B.R. 147, LRB File No. 229-99.

[34] Finally, the Employer also asked this Board to review the sufficiency of the support evidence submitted with the Union's certification application after we make our determinations with respect to both the production heads and disputed employees. The Employer argued that, after these determinations had been made by the Board, it may be possible that the Union did not file sufficient evidence of support with its certification application. In which case, the Employer argued that the Union's application ought to be dismissed and the ballots in the ballot box destroyed without tabulation.

Relevant Statutory Provisions:

[35] The relevant provisions of *The Trade Union Act* are as follows:

> *2 In this Act:*
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> *(f) "employee" means:*
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> *(i) a person in the employ of an employer except:*
>
> *(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character; or*
>
> *(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer;*

Analysis:

[36] In this case, we have been called upon to make four (4) determinations; namely:

1. Whether or not the production heads ought to be excluded from the bargaining unit because the primary responsibilities of these positions involve the actual exercise of authority, and the actual performance of functions, that are of a managerial character (i.e.: the managerial exclusion)?

2. Whether or not the six (6) disputed employees, employees who were employed by the Employer during the relevant time but who had not worked within the scope of the bargaining unit at the time of the Union's application, ought to be eligible to participate in the representative questions?

3. Whether or not there were any other casual employees (that were not working at the time of the Union's certification application) who should have been given an opportunity to participate in the representation vote?

4. Whether or not the Union filed sufficient evidence of support with its certification application for the unit determined to be appropriate by the Board?

Status of the Production Heads:

[37] In *The Saskatchewan Institute of Applied Science and Technology v. The Saskatchewan Government and General Employees' Union*, 2009 CanLii 72366, LRB File No. 077-06, this Board was called upon to determine whether or not certain disputed positions ought to be excluded from the bargaining unit either on the basis of the managerial exception (i.e.: where the primary responsibilities of a position involved the actual exercise of authority, and the actual performance of functions, that are of a managerial character) or on the basis of the confidential exception (i.e.: because a position regularly acts in a confidential capacity with respect to industrial relations of the workplace) or some sufficient combination of both. The Board restated the established principles relative to such determination as follows:

> *[55] The Board has on many occasions articulated helpful criterion for the making of such determinations but has also concluded that there is no definitive test for determining which side of the line a position falls (i.e.: within or outside the scope of the bargaining unit). Simply put, the Board's practice has been to be sensitive to both the factual context in which the determination arises and the purpose for which the exclusions have been prescribed in the Act. The Board tends to look beyond titles and position descriptions in an effort to ascertain the true role which a position plays in the organization. See: Grain Service Union (ILWU Canadian Area) v. AgPro Grain Inc., [1995] 1st Quarter Sask. Labour Rep. 243, LRB File No. 257-94; Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Remai Investments Corporation, [1997] Sask. L.R.B.R. 335, LRB File Nos. 014-97 & 019-97; and University of Saskatchewan v. Administrative and Supervisory Personnel Association [2008] Sask. L.R.B.R. 154, LRB File No. 057-05.*

> *[56] The purpose of the statutory exclusion from the bargaining unit for positions whose primary responsibilities are to exercise authority and perform functions that are of a managerial character is to promote labour relations in the workplace by preserving clear identities for the parties to collective bargaining (and to avoid muddying or blurring the lines between management and the bargaining unit). See: Hillcrest Farms Ltd. v. Grain Services Union (ILWU – Canadian Area), [1997] Sask. L.R.B.R. 591, LRB File No. 145-97.*
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> *[57] The purpose of the statutory exclusion for positions that regularly act in a confidential capacity with respect to industrial relations is to assist the collective bargaining process by ensuring that the employer has sufficient internal resources (including administrative and clerical resources) to permit it to make informed and rational decisions regarding labour relations and, in particular, with respect to collective bargaining in the work place, and to permit it to do so in an atmosphere of candour and confidence. See: Canadian Union of Public Employees, Local 21 v. City of Regina and Regina Civic Middle Management Association, [2005] Sask. L.R.B.R. 274, LRB Files Nos. 103-04 & 222-04.*
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> *[58] The Board has noted that, unlike the managerial exclusion, the duties performed in a confidential capacity need not be the primary focus of the position, provided they are regularly performed and genuine. In either case, the question for the Board to decide is whether or not the authority attached to a position and the duties performed by the incumbent are of a kind (and extent) which would create an insoluble conflict between the responsibilities which that person owes to his/her employer and the interests of that person and his/her colleagues as members of the bargaining unit. However, in doing so, the Board must be alert to the concern that exclusion from the bargaining unit of persons who do not genuinely meet the criteria prescribed in the Act may deny them access to the benefits of collective bargaining and may potentially weaken the bargaining unit. As a consequence, exclusions are generally made on as narrow a basis as possible, particularly so for exclusions made because of managerial responsibilities. See: City of Regina, supra.*
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> *[59] Finally, the Board recognizes that employers and trade unions often negotiate scope issues and come to resolutions that may not be immediately apparent to the Board. In accepting these determinations, the Board acknowledges that the parties are in a better position to determine the nature of their relationship. The determinations that have been made by the parties can be of great assistance to the Board in understanding the maturity of the collective bargaining relationship and kinds of lines that the parties have drawn between management and its staff. However, in the Board's opinion, when it is called upon to make determinations as to scope, the benchmark for our determinations must be s. 2(f)(i) of the Act (the definition of an "employee") and our understanding of the purposes for which the statutory exemptions were included. While we are mindful of the agreements of the parties as to the scope, the genesis for our determinations must be The Trade Union Act and the jurisprudence of the Board in interpreting that statute.*

[38] It was apparent to the Board that the productions heads (namely, the Head of Wardrobe, the Head of Scenic Carpentry, the Head of Properties, the Head of Sound and the Head of Lighting) had been delegated certain authorities of a managerial character; authorities that were actually exercised and performed by the incumbents. Specifically, the production

heads had authority to hire casual employees to satisfy the labour requirements of their respective departments and to independently do so based upon their own selection criteria. It was also evident to the Board that the production heads had the practical authority to determine whether or not casual employees were rehired from show to show. Both of these factors would tend to indicate that the production heads should not be included within the proposed bargaining unit.

[39] On the other hand, other factors; in our opinion, factors that tip the balance the other way; indicate that these positions should be included within the scope of the bargaining unit. For example, the authority of the department heads to hire was limited to casual employees, who were retained for intermittent periods. It was noted by the Board that in 2010 it was the Director of Production, and not the Head of Scenic Carpentry, that hired the two (2) specialized carpenters that were required for the 2010/11 season. This evidence tended to indicate that the hiring authority delegated to production heads was limited to the established pool of casual employees. In addition, the production heads had limited authority to determine the terms and conditions of employment for the casual employees and that most major determinations as to wages and benefits were made by those above the production heads. The evidence tended to indicated that the Director of Production, and not the production heads, researched and determined the standard wages and benefits for the theatre, with production heads have some authority to enhance the standards. This evidence, while indicative of some independent discretion on the part of the production heads, tended to indicate that they were primarily conduits for the labour relations determinations of more senior officials of the theatre.

[40] In addition, the fact that the production heads were seasonal employees, with a tenure longer in duration but similar in kind to that of the casual employees, tended to align them more closely with members of the bargaining unit, than management. Also of significance to the Board was the fact that the Union was seeking to represent essentially a craft unit and that the exclusion of the production heads would remove them from representation by a trade union specifically intended to represent their respective crafts. Finally, and of particular significance, excluding the production heads would undoubtedly weaken and divide the bargaining unit and would see a wholly disproportionate number of excluded positions for a relatively small bargaining unit. In our opinion, excluding the production heads would be inconsistent with this Board's policy of granting managerial exceptions on "*as narrow a basis as possible*". See: *Professional Institute of the Public Service of Canada v. Executive Branch of the Government of*

Saskatchewan and Saskatchewan Government Employees' Union, [1997] Sask. L.R.B.R. 530, LRB File No. 018-97; and *University of Saskatchewan v. Administrative and Supervisory Personnel Association*, [2007] Sask. L.R.B.R. 154, 2007 CanLii 68769, LRB File No. 067-05.

[41] In our opinion, the strongest argument for exclusion rested with the Head of Wardrobe, whose responsibilities have grown to where she had the least involvement with the tools of her craft of any of the heads of production. The Head of Wardrobe exercised authorities, and performed functions, of a managerial character to the greatest extent of any the production heads. Nonetheless, we were not satisfied that this position ought to be excluded from the bargaining unit. In our opinion, the production heads are primarily skilled men and women, who have been delegated additional responsibilities; some of a managerial character. Simply put, we were not satisfied that the managerial functions performed by the production heads, including the Head of Wardrobe, were the primary responsibilities of these positions. In our opinion, the duties and responsibilities of the production heads were more consistent with that of an in-scope supervisor.

[42] Having considered the evidence, we were not satisfied that the inclusion of the production heads within the bargaining unit would create the kind of insoluble conflict of interest that the Board seeks to avoid in managerial scope determinations. On the other hand, we were satisfied that exclusion of these positions would unduly harm the bargaining unit and unnecessarily exclude skilled artisans from representation.

Status of the Disputed Employees:

[43] The Employer argued that the disputed employees had a sufficient and continuing relationship with the Employer and/or the Production Department to justify their participation in the representation question. The Employer noted that the disputed employees had all worked in the Production Department at one time or another during the preceding season and that they continued to be employed by the Employer at the time of the Union's certification application, albeit not in the Production Department. The Employer also noted that all of the disputed employees had expressed an interest in working in the Production Department and that many had received training for skills needed by that department. The Employer took the position that the application of a "sufficiently tangible relationship" test would indicate that the disputed employees had a legitimate interest in representation questions and that their ballots ought to be counted.

[44] We were not persuaded by this argument. In our opinion, the "sufficiently tangible relationship" test, while relevant, is not particularly instructive in determining the status of the disputed employees. The "sufficiently tangible relationship" test is helpful in determining whether or not causal employees (employees not employed by an employer at the time of a certification application) ought to participate in the representation question. In the present case, the disputed employees were employed by the Employer. As such, there is no doubt that they all had a tangible and continuing relationship with the Employer. However in this particular case, the Board must be mindful that the Union is not seeking to represent all of the employees of the Employer. Rather, the Union is only seeking to represent the employees in the Production Department. As a consequence, this Board must focus its attention on the relationship between the disputed employees and that department; noting that each of the disputed employees had more than one (1) employment relationship with the Employer.

[45] We were persuaded by the argument of the Union that helpful guidance can be found in the construction sector; where certifications routinely occur upon a craft basis; where some employees work for an employer in more than one (1) craft; and where this Board has been called upon to determine whether or not such employees are eligible to participate in the representative question for a particular craft. In *K.A.C.R. (A Joint Venture), supra*, this Board stated its approach in the construction sector as follows at page 45 of that decision:

> ***Where employees are engaged in the work of different crafts the Board will characterize the craft in which they were employed for a majority of their time as the one governing their status on an application for certification.*** *In determining which type of work employees were employed at "for a majority of their time" the Board will look not to the date of the making of the application but, rather to a period of time leading up to the date of the application. Just how far back in time the Board will go depends on the particular circumstances of the individual case. See Teamster Local Union No. 230 et al v. Johnson-Kiewit Subway Corporation 66 C.L.L.C. 16,091 at page 912 and Chauffeurs, Teamsters & Helpers, Local 395 v. Western Caissons (Sask) Limited, 67 C.L.L.C. 16,015 at page 983.*
>
> *The Board will attempt to review actual job duties over a reasonably representative period of time and will not permit either the union or the employer to confine the review to an arbitrarily established time frame which is not indicative of normal responsibilities. In this case, it was inappropriate to take a two week "window" immediately prior to the date of the filing of the application which was, of course, during the winter shut down, in order to determine what work the employees involved were performing the majority of their time.* (***Emphasis added)***

[46] A review of the recent employment history of the disputed employees would indicate that all were employed for the vast majority of their time outside of the Production Department and none were employed within the Production Department in the months immediately preceding the Union's application. Not only was the majority of the disputed employee's time worked outside of the Production Department, but their remuneration from work within the Production Department was dwarfed by their remuneration from the Employer from outside of that department.

[47] In our opinion, the relationship which the disputed employees enjoyed with the Production Department was clearly subordinate to their other relationship with the Employer. While the disputed employees had aided the Production Department in the past and may well do so in the future, their economic interests with the Employer, fell well outside of the scope of the proposed bargaining unit.

[48] In addition (and potentially in the alternative), we were not satisfied that employment relationship which the disputed employees had with the Production Department, *simpliciter*, was sufficient to justify their participation in the representation question. It was not apparent from the evidence that any of the disputed employees worked any hours in the Production Department for the show that was being performed at the time the Union's application was filed (i.e.: "*Shakespeare*") or for the preceding show (i.e.: "*Hope at Home*"). In our opinion, the employment relationship of the disputed employees with the Production Department was too tenuous to justify their participation in the representation question.

[49] For the foregoing reasons, we have concluded that the ballots of the disputed employees should not be counted in the representative question.

Were any employees inadvertently missed in the representation vote?

[50] During the course of argument with respect to the status of the disputed employees, the possibility arose that there were other casual employees who potentially should have participated in the representation question, but who were not afforded the opportunity to do so when the vote was conducted on April 8, 2010. Neither party advanced this point prior to the hearing. However, in argument, both acknowledged that, depending on the threshold determined by the Board for inclusion of casual employees in the representative question, someone may have been missed.

[51] From the evidence presented to the Board, it appeared that only employees who were working for the Employer at the time of the Union's certification application participated in the representation vote. As noted, this Board has previously applied the "sufficiently tangible relationship" test to determine a threshold for participation of casual employees in the representation question; such as this Board did for relief librarians in *Canadian Union of Public Employees v. Lakeland Regional Library Board*, [1987] Apr. Sask. Labour Rep. 59, LRB File No. 116-86, or for casual cab drivers in *Retail Wholesale Canada v. United Cabs Ltd.*, [1996] Sask. L.R.B.R. 337, LRB File No. 115-95. This kind of test was advanced by both parties to aid the Board in determining whether or not the disputed employees ought to have participated in the representation question. However, it was not apparent that the parties turned their mind to whether or not there were other casual employees (employees who were not working at the time of the Union's certification application) who may have had a sufficiently tangible relationship with the Production Department to justify their participation in the representation question. During the hearing, both parties acknowledged that, depending on the threshold determined by the Board for participation of casual employees, some employees could have been inadvertently missed in the representation vote.

[52] Given the episodic nature of work in the Production Department, the appropriate threshold test would be to include any causal employees (not working for the Employer at the time of the Union's application) who had worked a minimum of twenty-five (25) hours in the Production Department in both the show that was in production at the theatre at the time the Union's application was filed with the Board (i.e.: "*Shakespeare*") and in the immediately preceding show (i.e.: "*Hope at Home*"), provided such employees had not severed their relationship with the Production Department prior to April 8, 2011. As this Board has previously stated, such thresholds are "admittedly arbitrary". Nonetheless, in our opinion, the aforementioned threshold is reasonably inclusive of employees in the casual pool who have a sufficiently tangible relationship with the Production Department to justify their participation in the representation question; while at the same time, without casting the net so broadly as to include persons who have merely a tenuous connection with that department.

[53] We were unable to determine from the evidence whether or not the application of this test would call for the participation of other casual employees; employees who were not working for the Employer at the time of the application but otherwise satisfied the above captioned criterion. As a consequence, we appoint the Board Registrar to meet with the parties

and we provide the above threshold for the guidance of the parties in the hope that they can utilize this criterion to reach an agreement as to whether or not anyone was missed when the representation vote was conducted on April 8, 2011. We remain seized of this matter in the event that further direction or determinations are required from the Board.

Sufficiency of support filed with Union's certification application:

[54] After making our determinations with respect to the production heads and the disputed employees, the Employer asked this Board to re-examine the evidence of support to ensure that it continued to be sufficient within the meaning of s. 6 of the *Act* (i.e.: demonstrative of at least 45% support from members of the bargaining unit). However, because this Board was unable to make a final determination with respect to the potential participation of other casual employees, we were unable to make a final determination with respect to this issue as well.

[55] We can, however, state that the Union filed sufficient evidence of support for the bargaining unit it originally applied in its certification application. Furthermore, we can state that the determinations of this Board with respect to the inclusion of the production heads and the agreements of the parties with respect to scope of the bargaining unit (i.e.: the exclusion of the designers represented by the Associated Designers of Canada) and the determination of this Board with respect to the exclusion of the disputed employees and the agreements of the parties with respect to the composition of the voters list (i.e.: with respect to exclusions of Anna Hansen, Julia Fullerton, Lisa Russell, Aubree Erickson, and Daniel Maslany) thus far in these proceedings have not altered the sufficiency of that support in accordance with the threshold prescribed pursuant to ss. 6(1.1) of the *Act*.

[56] Finally, in making the above observations, we leave for another day and make no determination as to what action this Board should take following the conduct of a pre-hearing vote pursuant to ss. 18(v) of the *Act* in the event subsequent determinations by the Board with respect to either the composition of the bargaining unit or eligibility to participate in the representation question undermine the sufficiency of the evidence of support filed by an application trade union pursuant to ss. 6(1.1) of the *Act*.

Conclusion:

[57] Having considered the evidence in these proceedings and the argument of the parties, we have concluded that the following unit of employees is an appropriate unit for collective bargaining with the Employer:

> *All production employees employed by the Globe Theatre in the City of Regina, including the Head of Scenic Carpentry, Head of Props, Head of Wardrobe, Head of Lights, Head of Sound, production assistants, prop builders, cutters, stitchers, stage carpenters, and all stage hands and excluding set designers, costume designers, lighting designers, sound designers, and projection designers and the Artistic Director, Executive Director and Director of Production.*

[58] With respect to the representation question, we have determined that the ballots of the six (6) disputed employees should be removed from the ballots box, destroyed and not included in the tabulation of the representation vote. However, the ballot box shall remain sealed pending either agreement by the parties as to the final composition of the voters list based on the determinations provided herein and/or further direction from this Board if necessary.

[59] We ask the Board Registrar to report to the Board within thirty (30) days as to the status of the remaining matters in issue in these proceedings.

DATED at Regina, Saskatchewan, this **27th** day of **September, 2011.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson