

BRITISH COLUMBIA LABOUR RELATIONS BOARD

FOREVER GIRLS PRODUCTIONS INC.

(the "Employer")

-and-

UNION OF B.C. PERFORMERS

("UBCP")

-and-

ACTRA B.C. PERFORMERS GUILD

("ACTRA")

PANEL: Brent Mullin, Vice-Chair
Hank Goodman, Member
Lynn Hancock, Member

COUNSEL: Herb J. Isherwood and David Hunter, for the Employer
Shona A. Moore and Donald Bobert, for UBCP
Laura Parkinson, for ACTRA

CASE NOS.: 19416 and 19479
DATES OF HEARING: August 2, 3, 4, 5, 11, and 12, 1994
DATE OF DECISION: September 15, 1994

DECISION OF THE BOARD

I. NATURE OF THE APPLICATIONS

On June 24, 1994 UBCP applied to the Labour Relations Board under Section 18 of the *Labour Relations Code* to be certified to represent a bargaining unit of employees of the Employer described as "performers and stunt coordinators in British Columbia". On June 28, 1994 ACTRA applied to be certified to represent the same bargaining unit of employees. In their respective applications, both parties relied upon paid up dues for membership support (Labour Relations Regulation 3(c)(ii)). However, the Board also received a number of letters in which ACTRA members stated that they did not wish to support ACTRA's application for certification. Within the certification context these were contemporaneous applications and, as a result, a run-off vote was held. The ballots were sealed pending the determination of the issues in this case.

II. BACKGROUND

ACTRA and UBCP represent performers engaged in the production of television, motion pictures, and commercials in the province of British Columbia. Performers maintain membership in both unions in order to maximize the potential for obtaining work. The two unions thus seek to represent the same constituency of employees in the movie industry. The history and relations of ACTRA and UBCP have been dealt with extensively in previous Board decisions: *Jetlag Productions Ltd. et al.*, IRC No. C77/91; *Cannell Films Ltd.*, IRC No. C90/91; *Jetlag Productions Ltd. et al.*, IRC No. C165/91; *Screenventures IV Inc. (The Adventures of the Black Stallion)*, IRC No. C240/91; *Screenventures IV Inc. (The Adventures of the Black Stallion)*, IRC No. C65/92; *Screenventures IV Inc. (The Adventures of the Black Stallion)*, IRC No. C119/92 (Reconsideration of IRC No. C65/92); *Soapbox Productions Inc.*, IRC No. C235/92; and *Are We Having Fun Yet? Productions, Inc.*, BCLRB No. B227/94. None of that will be repeated here. It is sufficient to say that the relations between ACTRA and UBCP are extremely contentious, as reflected in the proceedings before us.

III. ISSUES

There are three issues:

1. Are performers engaged by the Employer in the United States under a performance contract which incorporates the collective agreement between the United States based Screen Actors' Guild ("SAG") entitled to be considered in the certification applications?
2. Are stunt performers and actors who work less than four days on the production entitled to be considered in the certification application? Inherent in this issue is whether the Board established a four day rule in its decision in *Screenventures IV Inc. (The Adventures of the Black Stallion)*, IRC No. C65/92 (hereinafter "*Screenventures*"), and, if so, whether that rule in regard to extras or background performers applies to actors and stunt performers.
3. Does ACTRA have sufficient minimum 45% membership support for its certification application? This issue is based on two challenges to the ACTRA membership support:
 - (a) Are SAG members *per se* members of ACTRA for the calculating of membership support?
 - (b) Did certain members of ACTRA effectively withdraw their membership support in respect to ACTRA's certification application by means of their letters to the Board?

IV. POSITIONS OF THE PARTIES

UBCP says that as a result of the third issue, ACTRA may not have the required 45% minimum support for its application. If that is the case, the Board does not have the jurisdiction to count the run-off vote. Instead, ACTRA's application must be dismissed and UBCP's application for certification granted.

UBCP challenges ACTRA's membership support, firstly, on the basis that the

constitutional provisions of ACTRA and SAG cannot satisfy the requirements of membership support in and of themselves (*Bennett Pollution Controls Ltd.*, BCLRB No. 18/77, [1977] 1 Can LRBR 462) and on the basis of a detailed reading of the provisions. Secondly, UBCP argues that the letters from the ACTRA members should be considered by the Board as a withdrawal of the membership support of these individuals from ACTRA's certification application. UBCP says that the requirement for revocation in Regulation 4 of the Labour Relations Regulations explicitly states and only applies to membership cards (Regulation 3(c)(i)), not the evidence of membership support in the form of paid up dues as relied upon by both parties in this case (Regulation 3(c)(ii)). In taking this position, UBCP acknowledges that in the future it too may not know with certainty whether its paid-up members can in fact be relied upon in support of an application for certification, because they may have filed such letters and these letters should be treated confidentially by the Board (Section 124(3) of the Code). As a consequence, practically speaking, for certainty both UBCP and ACTRA may have to specifically sign up members for their certification applications. In support of its position on this point, UBCP relies upon the policy in *Bennett Pollution Controls Ltd.*, *supra*; *Phillips Cables Ltd.*, BCLRB No. 52/77; *Pioneer Pacific Developments Ltd.*, BCLRB No. B29/93.

In regard to the American performers under SAG contracts, UBCP says that they do not have a community of interest with the other performers, who at the present time are not engaged under a collective agreement. These American performers under SAG contracts already have a trade union who represents their interests and they do not need a further trade union to do so. Another reason why these performers do not share a community of interest with the other performers is that they may be diametrically opposed in terms of interests. For instance, the Canadian trade unions may seek to negotiate restrictions on the use of United States performers. In support of that, UBCP refers to the requirement on this production that a Canadian Stunt Coordinator be hired along with the American Stunt Coordinator.

In regard to ACTRA's challenges to certain of the stunt performers on the basis that they have not met the four day rule allegedly established by the Board in *Screenventures*, UBCP disagrees with ACTRA's reading of that decision and the asserted four day rule. It says that in any event the Board now has had fuller opportunity to consider the point in relation to the specific individuals challenged in this case, and notes that the evidence before this Panel is that stunt performers can at times earn six figure incomes here in British Columbia. They are thus far

removed from those individuals who work on productions as extras or background performers.

ACTRA says that the letters filed by employees purporting to withdraw their support from ACTRA's certification application should be disregarded as ineffective revocations. Section 22(3) of the Code requires that membership in good standing in a trade union be determined on the basis of the membership requirements prescribed in the Regulations. Regulation 3(c)(ii) provides for reliance by a union on maintenance of membership within a 90 day period by timely payment of dues. Regulation 4 sets forth the requirements for revocation of that membership support. To allow revocation other than in compliance with that provision in the Regulations would constitute a jurisdictional error by the Board.

From a policy perspective, the changes in the membership regulations attendant upon the introduction of the Code make it clear that the Board will not go behind membership evidence lightly: *Elkview Coal Corporation*, BCLRB No. B335/93 (Leave for Reconsideration of BCLRB No. B288/93, denied). Even prior to these amendments, it was the long-standing policy of the Board that revocations would only be considered if received prior to the date of application for certification: *Phillips Cables Ltd.*, *supra*; *Elkview Coal Corporation*, *supra*. Petitions from employees, as well as revocations, which are filed after an application for certification will not be considered by the Board: *Elkview Coal Corporation*, *supra*. From a practical point of view such "revocations" should not be allowed because it would produce a chaotic situation. From a policy perspective, the members filing these letters want the benefits of membership in the union, but not the obligations. That is not acceptable. Their choice is to either revoke their membership or not. Also, if the Board were to allow these revocations, it could not limit its ruling to this dispute and this procedure would have tremendous implications for other industries, in particular the construction industry. Lastly, *Pioneer Pacific Developments Ltd.*, *supra*, is distinguishable in that it deals with the construction industry and the transition provision in the Code, Section 162.

ACTRA says that UBCP's reading of its constitution, and the constitution of SAG, is not correct. It is not the case that temporary membership is no better than a work permittee under the UBCP constitution, and the lack of voting rights is not a hallmark of membership in good standing in any event. Effectively the constitutions provide that membership in SAG results in membership in ACTRA when working on a production based and shooting in Canada.

In regard to the United States performers engaged by the Employer under SAG based contracts, ACTRA says that residency has never been a test for eligibility to be considered in a certification application and that was the initial way in which UBCP formed their objection to the consideration of these individuals. These American performers are presumptively in the bargaining unit as they fall within the bargaining description. Their inclusion is supported by the community of interest factors outlined in *Island Medical Laboratories Ltd.*, BCLRB No. B308/93 (Leave for Reconsideration of IRC No. C217/92 and BCLRB No. B49/93), (1993), 19 CLRBR (2d) 161), including the presumption against the creation of an additional separate bargaining unit, such as would be the case here for non-resident performers.

In terms of its challenges, ACTRA bases these challenges on its reading on the Board's *Screenventures* decision. It relies on the determination in that case that extras and performers who worked less than four days on the production were not given a vote. The reasoning of the original panel on that point was not appealed and the parties have effectively lived with it since. On a policy basis, that previous decision should be followed: *Vancouver Fancy Meats, Division of Thomas J. Lipton Inc.*, IRC No. C186/88 (Reconsideration of BCLRB No. 135/87). On the basis of not meeting this requirement of four days work on the production, ACTRA says that the votes of Mike Vezina, James Bell, Dawn Stoffer, George Josef, and James Smith should not be counted.

V. ANALYSIS

We will deal with each issue in turn.

1. United States Performers Engaged Under SAG Based Contracts

A unique aspect of the UBCP, ACTRA and SAG collective agreements for performers is that they provide only minimum terms of compensation. Individual performers are entitled under the collective agreements to negotiate for greater compensation from an employer if they can. Normally that is done through an agent for the performer and the signing of a deal memo. The terms in the deal memo are subsequently put into an individual contract of employment between the performer and the production company. That contract of employment incorporates the terms of the relevant collective agreement as minimum terms and conditions.

This is an established and accepted pattern in the industry, as reflected in the respective performer collective agreements. Which collective agreement is applicable and will be incorporated into the Employer's contract of employment with the production company would also appear to be established and accepted. At least in terms of the issue before us, it appears to be a standard part of the industry that United States based performers who are hired in the United States for a production to be shot in Canada, will be hired under the minimum terms and conditions in a SAG collective agreement. As noted above, the further terms and conditions the performer may negotiate is a matter normally addressed by the performers' agent with the production company, resulting in a deal memo and ultimately an individual contract of employment.

Concomitantly, British Columbia based performers hired by a production company to work on a production to be shot in British Columbia, will be hired under the minimum terms and conditions of either a UBCP or ACTRA performers' collective agreement. Thus in the present case the Employer, consistent with this practice in the industry, was aware that the British Columbia based performers were being engaged under the terms and conditions of either a UBCP or ACTRA collective agreement. It simply needed to know which one applied in order to complete the contracts of performance and direct certain benefits and other payments under the collective agreement to the appropriate union.

Implicit within this established practice and structure in the industry is the inherent understanding and acceptance that United States based performers hired in the United States for a production to be shot in British Columbia will be hired and perform under at least the minimum terms and conditions in a SAG collective agreement. Putting that industry practice into the legal terms the Board uses to address such issues, it would be said that it is established, understood, and accepted in the industry that the community of interest of these performers lies with the bargaining unit under the SAG collective agreement, and not with the bargaining unit of employees to be represented here by either UBCP or ACTRA.

Based on what was before us, that implicitly understood and accepted delineation of community of interest and jurisdiction both makes sense and appears to work. For instance, without over dramatizing the point (because that would not be consistent with the evidence before

us), to some extent British Columbia and its movie industry performers are in competition with United States based performers to obtain the work of the production companies. That is inherent in the delineation of jurisdictions and what would be called in the context of this case the separate communities of interest. Of course, the realities of the industry are that a large production, such as that in this case, will include United States based performers engaged under SAG contracts and British Columbia based performers engaged under either UBCP or ACTRA contracts. The pattern in the industry thus reflects both the separate communities of interest and the requirement for the coordination and cooperation of these communities of interest.

In general, the Board will respect the contractual arrangements of parties unless there is a clear basis on which not to do so: *Kelowna Centennial Museum Association*, BCLRB No. 50/77, [1977] 2 Can LRBR 285, at p. 290. In the present matter, there is no basis upon which to interfere with the established relations in the industry and we think that to do so may very well be harmful. As a consequence, we see no grounds for the United States based performers engaged under SAG contracts to be considered in the current certification applications. To allow them to be considered would run counter to the accepted arrangements and communities of interest in the industry.

2. The ACTRA Challenges

ACTRA challenges the eligibility of certain individuals on the basis that they do not meet what ACTRA asserts is a four day rule set forth by the Board in its *Screenventures* decision. ACTRA says Vezina and Stoffer each worked only two days as stunt performers; Josef only one day as a stunt performer; Bell has not actually appeared on camera yet, although engaged to appear as an actor; and Smith has actually worked two days as an actor, and received the equivalent of one other day's pay because of cancellations (at the rate of 50% for each of two cancelled days).

We find we cannot accept ACTRA's arguments. First of all, we think it is a strained reading of the *Screenventures* decision to assert that it stands for a four day rule. ACTRA attempts to support that assertion by arguing that in the specific determinations in *Screenventures*, extras (and one performer, Susan Gillis-Smith) who worked less than four days on the production were held not to be entitled to vote. In contrast, an extra who worked four days on the

production was entitled to be considered part of the bargaining unit and vote. Thus, allegedly the four day rule. However, we find nothing more in the decision than, as stated in it, a specific application of the Board's usual approach to casual or temporary employees as set forth in *Edoco Healey Technical Products Ltd.*, BCLRB No. 81/79, [1980] 1 Can LRBR 570. If the Board in that decision had been setting some form of rule for the industry, it would have specifically stated so. Thus, for extras or background persons, we accept that *Screenventures* applies the *Edoco Healey, supra*, test, but not that *Screenventures* establishes a four day rule for either extras or other performers.

With respect to the stunt performers and actors at issue in the present case, we do not find the *Edoco Healey* test to be applicable. As submitted by UBCP, as a Panel we have had the benefit of considerable evidence and argument on the nature of the employment of actors and stunt performers in movie productions. On that basis, we find that the employment of actors and stunt performers in the industry is unique. In some ways, it shares the unique nature of employment in the craft organized sector of the construction industry. It is clear, for instance, that employment is obtained on a production-by-production basis and that performers look to their union (currently in British Columbia, their unions) to obtain productions and thus work for them. In that sense, the performers look to their union(s) for continuity of work in the industry, rather than a particular employer. That is similar to the craft organized sector of the construction industry: see *R.M. Hardy & Associates Ltd.*, BCLRB No. 41/77, [1977] 2 Can LRBR 357.

However, the employment of performers in the movie industry is different from the craft organized sector of the construction industry in the absence of a hiring hall. In the craft sector of the construction industry, a union will enter into a collective agreement with an employer which will contain a hiring hall clause under which its members are dispatched to the employer. That is not the case in the movie industry and, at least with respect to actors and stunt performers, that is understandable. For instance, actors, as opposed to extras or background persons, are hired to perform a specific role. For example, in the present case James Smith has been engaged to perform the role of a minister in the production. It is simply not conceivable that an employer would agree to the dispatch of any qualified actor from a hiring hall to play the role. The same can be true of stunt performers, for instance when they act as stunt doubles for other actors in the production. (In terms of stunt performers, in general we found their circumstances to be much more akin to that of the actors than those of extras or background persons. To be stunt

performers, they have invested in their career much the same as have actors.) As well, irrespective of whether or not a hiring hall would be possible in certain circumstances, the fact of the matter is that the collective agreements in the industry do not contain a hiring hall and the employers have thus generally retained the right, as a result, to engage the individuals they chose.

In the result, the employment of actors and stunt performers in the movie industry shares some of the unique aspects of construction employment, but without the hiring hall/dispatch system. In these circumstances, we find that actors and stunt performers both work in a unique employment context and have a unique interest in the representational choice in certification. The impact of this on entitlement to the franchise in the Code is two-fold. Firstly, an actor or stunt performer working on the date of application should be entitled to exercise the franchise (and cast a ballot if a vote is held) without establishing a sufficient, continuing interest in the employment in the *Edoco Healey* sense. The employment relationship and the performer's relationship with the union(s) are of a unique nature which dictates that there should be an entitlement to exercise the franchise without meeting this test. Secondly, we further hold that any actor or stunt performer who has been engaged by an employer to work on a production should be entitled to exercise the franchise. That is irrespective of whether the individual has actually worked by the date of the application (or the vote, if there is a vote) and, as has already been discussed, irrespective of the length of employment.

Thus, we find that Bell should be entitled to vote, even though at the time of the application and the time of the vote he had not actually appeared on camera. He has been engaged by the Employer as an actor on the production (in the role of a guard) and thus has an interest to be exercised and protected through the franchise in the Code. Similarly, Smith should be entitled to vote, as should the stunt performers Vezina, Stoffer, and Josef.

3. ACTRA's Membership Support

(a) SAG Membership

Irrespective of the particulars in the constitutions of ACTRA and SAG, we find that membership in SAG cannot in and of itself constitute ACTRA membership for the purpose of certification under the Code: *Bennett Pollution Controls Ltd.*, *supra*, at pp. 6-7.

(b) The Letters Withdrawing Support For ACTRA's Certification Application

Regulations 3 and 4 of the Labour Relations Regulation state:

3. For the purpose of establishing membership in good standing in a trade union where that trade union is making an application for certification, the following minimum criteria apply:
 - (a) a membership card must be signed and dated at the time of signature;
 - (b) a membership card signed on or after January 18, 1993 must contain the following statement:

In applying for a membership I understand that the union intends to apply to be certified as my exclusive bargaining agent and to represent me in collective bargaining.
 - (c) within 90 days of the application for certification,
 - (i) the membership card must have been signed, or
 - (ii) active membership must have been maintained by dues payments.
4. A membership card may be revoked by delivering a written statement signed by the member to the trade union and the Labour Relations Board on or before the date of application for certification.

ACTRA asserts that the letters filed with the Board purporting to withdraw support from its

certification application cannot be considered because they do not meet the requirements in Regulation 4. UBCP says that Regulation 4 applies to membership cards and thus Regulation 3(c)(i) only, not membership support in the form of paid-up dues as referred to in Regulation 3(c)(ii); therefore, the letters withdrawing support from ACTRA's certification application can be considered.

We find that on a plain reading of Regulations 3 and 4 as a whole, it must be concluded that the letters cannot be considered. Regulation 3 sets forth the "minimum criteria" for membership evidence in support of certification applications. These minimum criteria are in subsections (a) through (c). As minimum criteria, they must always be met. Among the minimum criteria to be met, there must always be a membership card which has been signed and dated at the time of signature in order for there to be valid membership evidence (subsection (a)). That is true even if the card was signed prior to 90 days before the application for certification, but is considered valid for establishing membership support because supported by paid-up dues within that 90 day period (subsection (c)(ii)).

Consequently, the reference to "a membership card" at the outset of Regulation 4 refers to all means of establishing membership in good standing in a trade union as set forth in Regulation 3. In the result, the requirements for revocation in Regulation 4 apply to membership evidence irrespective of whether a card has been signed within 90 days prior to the application for certification (Regulation 3)(c)(i)), or was signed prior to that period but is supported by dues payments within the 90 day period (Regulation 3(c)(ii)).

The letters at issue in the present case attempt to withdraw support only from ACTRA's current certification application. They do not purport to revoke membership in ACTRA *per se*. As a result, they do not meet the requirements in Regulation 4. Given our determination above regarding the applicability of Regulation 4 to all forms of membership evidence in Regulation 3, the purported revocations of support in respect to ACTRA's certification application do not meet the requirements of Regulation 4 and can therefore be given no effect by the Board.

VI. DECISION

In summary, we have determined:

1. United States based employees engaged under contracts incorporating the SAG collective agreement are not entitled to vote in the certification applications.
2. Vezina, Bell, Stoffer, Josef, and Smith are in the employee constituency in regard to which the respective applications must establish membership support and are entitled to vote.
3. SAG membership *per se* does not constitute ACTRA membership for certification purposes under the Code, and the letters to the Board purporting to withdraw membership support only in regard to ACTRA's certification application are not valid revocations under Regulation 4 and therefore cannot be considered by the Panel.

In applying the above determinations to the respective certification applications, we find that, particularly as a result of our second determination above, ACTRA does not meet the threshold 45% membership support requirement in its application. As a result, its certification application must be dismissed. Because UBCP has sufficient support for certification without a vote, its application is granted.

On a closing note, we add that it is the view of this Panel that it would be in the interest of ACTRA's and UBCP's members, and the industry in general, for ACTRA and UBCP to again meet with the Board and attempt to resolve their dispute. The evidence before us indicated that Vancouver and British Columbia have become one of a fairly small number of destinations for the shooting of Hollywood productions. It would be a great shame if the continued contest between ACTRA and UBCP hindered the survival and further growth of this industry and the work it provides. That would also not be in the public interest of British Columbia. As a result, we request that ACTRA and UBCP contact the Registrar of the Board in order to arrange a further attempt to resolve the difficulties between them, or at least reduce the prospect of further litigation, and the negative impact that may have upon both the performers in the industry and the industry itself.

BRENT MULLIN
VICE-CHAIR

HANK GOODMAN
MEMBER

LYNN HANCOCK
MEMBER