BEFORE THE

IMPARTIAL UMPIRE UNDER THE AFL-CIO

INTERNAL DISPUTES PLAN

BETWEEN:	)	
	)	
INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS (IATSE)	)	Case No. 78-3
	)	
	)	In Re: WXYZ-TV
and	)	(Detroit, Michigan)
	)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (IBEW)	)	

MEMORANDUM ON BEHALF OF THE IBEW

Submitted by:

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The IBEW has charged IATSE with violating Section 20 and Section 2 of Article XX. IATSE has charged the IBEW with violation of Sections 2 and 3 of the same Article. This dispute relates to WXYZ-TV, Detroit, Michigan, where Portable Electronic Cameras or mini-cams (hereafter referred to as "PECs") have been used to cover news events. Three particular matters related to this coverage of the news are involved in the instant proceeding: video tape, sound, and lighting. 1/

I. RELEVANT ARTICLE XX CONSIDERATIONS AND THE SITUATION AT WXYZ-TV.

It is necessary to show exactly what matters are relevant to this dispute, because IATSE raised numerous issues completely extrinsic to Article XX, in an apparent attempt to confuse the IBEW's strong Section 2 case. 2/ IATSE also attempted to gloss over the distinctions between Sections 2 and 3.

Article XX is very precise in nature. It protects collective bargaining and work relationships that are "established", i.e., relationships that have, in fact, existed for a period of time. It does not deal with jurisdictional claims such as who should represent

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1/ Immediately before the hearing in this case IATSE first raised the issue of lighting. That aspect of the case never went beyond a mere allegation on the part of IATSE and the IBEW, never having raised that issue, introduced no evidence on it. Accordingly, the IBEW feels no need to address the lighting aspect of this case in any detail and will not exercise the opportunity given by the Impartial Umpire to introduce evidence on this subject. Of course, IATSE thus has no right to file a separate brief on the lighting issue.

2/ While IATSE took a long time to present its case, it never introduced any exhibits. Moreover, the testimony of its witnesses was in great part irrelevant, dealing with "photo journalism", the relative skills of IATSE and IBEW people, and how "unfair" the situation was.

people or who should do certain work. Nor does it deal with issues such as which affiliate is better at something, or more deserving, or more in need of members or work.

Section 2 of Article XX, in part, protects against the raiding of an established collective bargaining relationship which has arisen where an affiliate has "been recognized by the employer . . . as the collective bargaining representative for the employees involved for a period of one year or more . . . ."[3/] The underlined phrase requires focus on individual employees. In this dispute it is clear who the "employees involved" are. They are those persons who are doing the coverage of the news with the PEC and its related equipment. Specifically, the employees involved are the individuals listed in IBEW Ex. 8. The only relevant inquiry is whether the IBEW, in fact, has an established collective bargaining relationship for these employees and, if it does, has IATSE attempted to raid it.

The relevant evidence shows that at WXYZ-TV the bargaining rights are established. The IBEW has, in fact, been recognized by the Employer for over a year to represent the individuals who have been editing the video tape and recording the sound for news when a PEC has been used. In fact, the IBEW contract covers the classification of employees working with the electronic process and, in fact, the IBEW has represented the individuals who are the "employees involved" here. IATSE, by filing a UC petition, has attempted to represent those employees and has raided the established collective bargaining relationship of the IBEW.

Section 3 of Article XX protects against the raiding of an established work relationship, which exists when members of an affiliate have exclusively done certain work. The relevant question is

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3/ The IBEW has not focused upon the other element which creates an established collective bargaining relationship, an NLRB certification. The IBEW has a certification at WXYZ-TV, but it was so long ago (1947) that neither the Local nor the International has been able to find a copy of it. And, in light of the clear Employer recognition here, the IBEW doesn't feel it necessary to pursue the certification element.

whether one affiliate has been doing certain work exclusively and, if it has, has another affiliate attempted to raid that work. Of course, under Section 3 it is sometimes difficult to clearly define what the work is. In the instant dispute, it is possible to define it as the editing of video tape and the recording of sound when the PEC is used to cover news. This is the IBEW's position. It is also possible to define it as editing and recording of sound for news programming. This, presumably, will be IATSE's position.

Significantly, regardless of which version of the work is used, IATSE cannot show the requisite exclusivity. As the exhibits and all testimony showed, IBEW members have been doing the editing and have recorded sound for news for years at WXYZ-TV. Because IATSE cannot show exclusivity there is no possibility of a Section 3 violation by the IBEW.

II. IATSE HAS RECOGNIZED THAT THE INSTANT DISPUTE IS OF THE NATURE COVERED BY ARTICLE XX, YET IT RESORTED TO THE NLRB IN VIOLATION OF SECTION 20 OF ARTICLE XX.

Section 20 provides:

> "The provisions of this Article with respect to the settlement and determination of disputes of the nature described in this Article shall constitute the sole and exclusive method for settlement and determination of such dispute and the provisions of this Article with respect to the enforcement of such settlements and determinations shall constitute the sole and exclusive method for such enforcement. No affiliate shall resort to court or other legal proceedings to settle or determine any disputes of the nature described in this Article or to enforce any settlement or determination reached hereunder."

The very letters and telegrams which give rise to this case prove beyond a doubt that this is a dispute of the nature described in Article XX. By its letter of February 2, 1978, the IBEW stated that there is a dispute under Article XX. And, by its telegram of March 20, 1978, IATSE necessarily took a position that this is the kind of dispute which can be resolved under Article XX. In addition,

at the hearing both affiliates alleged that they have established relationships which are entitled to protection. There can be no stronger case for the conclusion that this dispute is of the nature described in Article XX.

It is also obvious that IATSE has improperly resorted to a legal proceeding, the NLRB, to resolve this dispute. See IBEW Ex. 1, a copy of the UC petitions filed by IATSE.

In Bell Aerosystems Company, Case No. 67-3, Umpire Cole found that where both affiliates had bargaining relationships dating back a number of years at a company and a problem concerning those relationships arose, there was a violation of Section 20 by the affiliate who filed a UC petition. Our instant case is a fortiori. This is because the affiliate who resorted to the NLRB - IATSE - has by its own action of filing charges under Article XX admitted that this is the kind of dispute that can be resolved under Article XX.

III. IATSE HAS ATTEMPTED TO REPRESENT EMPLOYEES OF WXYZ-TV FOR WHOM THE IBEW HAS BEEN RECOGNIZED BY THE EMPLOYER AS THE COLLECTIVE BARGAINING REPRESENTATIVE.

A. The IBEW Has An Established Collective Bargaining Relationship For The Employees Involved In This Dispute.

1. The Collective Bargaining Agreements.

WXYZ-TV has recognized the IBEW as representing employees who edit video tape and record sound when a PEC is used to cover the news. As shown at the hearing, the PEC is nothing more than a television electronic camera, miniaturized, and the related equipment is all electronic. Since 1949, WXYZ-TV has recognized the IBEW as the representative for employees involved with electronic processes. See IBEW Ex. 4, Article I, Section 4. It was also shown at the hearing that video tape recording is a key element to news coverage with a PEC. It is the video tape which records sound (and picture). It is the video tape which needs editing. And, since 1958, WXYZ-TV has specifically recognized the IBEW as representing employees who work with video recording. See IBEW Ex. 5, Article I, Section 4(c).

The recent collective bargaining documents at WXYZ-TV continue this long-standing recognition. In relevant part, Section 6(a) of the 1973 Agreement (IBEW Ex. 3) provides:

> "The trade jurisdiction of this Agreement shall include all . . . operation and maintenance of radio broadcast, television, voice, facsimile, rebroadcast equipment belonging to and/or to be used or being used by the Company by means of which electricity is applied in the transmission or transference, production or reproduction of voice, sound and vision, with or without ethereal aid; and including the cutting and processing of records and transcriptions of all types (wire, tape, film, etc.)."

Section 6(c) of the same Agreement provides:

> "Further it is agreed that the jurisdiction of the Union is expressly applicable to all electronic video equipment (including a combination electronic and attached motion picture camera), used either in connection with live broadcasting or in connection with electronic video recording. It shall include all related electronic and mechanical equipment used operationally for all recording, re-recording, processing, duplicating, cutting, splicing and playback, in connection with such video recordings."

In addition, since 1973 the IBEW Agreement has contained provisions dealing specifically with the PEC (called an electronic hand-held camera in the Agreement), the related video tape machine, and editing. Those provisions of the 1973 IBEW Agreement are: Section 6(f), which is entitled "VIDEO TAPE MACHINE"; Section 6(f)(5), which discusses video tape editing; and Section 6(n), which is entitled "ELECTRONIC HAND-HELD CAMERA", and states:

> "With respect to a remote or field assignment using an electronic camera capable of being hand-held and associated equipment, whenever such a camera (a) is combined with and feeds a portable video tape recorder or (b) is feeding to a studio or remote control point but the camera unit is operating on an independent basis, the first employee assigned shall be a Technical Director . . . ." (See IBEW Ex. 3.)

The latest collective bargaining document is a series of items amending the basic 1973 Agreement. The basic coverage relating to the electronic hand-held camera is carried over. Certain provisions were made more specific in the latest amendments and reflect the actual

practice over the years since the 1973 Agreement was negotiated. See IBEW Ex. 9, Items Nos. 5 and 8.[4/]

IATSE's bargaining agreements (IBEW Exs. 6 and 7) are also noteworthy. They show that WXYZ-TV has recognized IATSE to represent a group of employees entirely different and distinct from the IBEW unit. IATSE's contracts show that it has been recognized to represent employees who work with the film process, as distinct from the electronic process.

IATSE Local Union 812's contract is entitled "NEWSREEL SOUNDMEN CONTRACT". The word "NEWSREEL" is conclusive. It shows that these newsreel soundmen are the employees who record sound when the film process is used.[5/] Just as obvious is IATSE Local Union 199's limitation to editors of film. The very name of the Local is conclusive. That name is "DETROIT MOTION PICTURE PROJECTIONISTS UNION LOCAL NO. 199", and the words "MOTION PICTURE PROJECTIONISTS" tie these IATSE people to the film process. Throughout these Agreements references to film and the film process appear. That is the key element.

Nowhere in these IATSE Agreements is there any reference, direct or indirect, to the PEC, the mini-cam or the electronic hand-held camera. Nor is there any reference to video tape or to video tape

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[4/] IATSE made a vague allegation that the latest contract supplement was an improper agreement with the Employer to raid IATSE. That is absurd. The latest contract is simply a continuation of the IBEW's historic recognition by WXYZ-TV, which goes back to 1949, to represent employees who work with the electronic process. Moreover, an affiliate does not violate Article XX when it negotiates with an employer on matters relating to a unit it has always represented.

[5/] Local 812's Agreement refers to newsreel soundmen recording sound "on motion picture film by . . . magnetic means . . ." See IBEW Ex. 6, §3.1. As shown at the hearing, this is a reference to "magna-stripe", sound recorded on a thin stripe of magnetic tape that is physically attached to the film. In no way does this reference to sound "on motion picture film by . . . magnetic means" encompass video tape.

machinery or recorders. Lastly, there is no language in these Agreements which is general or broad enough to include all employees who are involved in news programming, irrespective of the process used. 6/

2. The Actual Practice.

The actual practice at WXYZ-TV is that the IBEW has represented the employees who edit video tape and gather sound when an electronic camera, such as the PEC, is used to cover the news. IBEW Ex. 8 conclusively shows this. James Osborn, Vice President and General Manager of WXYZ-TV, stated:

> "It has always been the Company's position, based upon NLRB Case No. 7-R-2616 and Section 6(a) of the WXYZ-TV - I.B.E.W. Agreement, that employees operating electronic cameras, including the portable electronic camera or 'mini-cam', and employees editing the video tape produced by such cameras are represented by the I.B.E.W. This is true for the coverage of news, documentaries or any type of programming."

B. IATSE Has Undisputably Attempted to Represent Employees As To Whom The IBEW Has An Established Collective Bargaining Relationship.

This element of the IBEW's case against IATSE is obvious. See IBEW Ex. 1, the UC petitions filed by IATSE. The general explanations attached to those UC petitions show that IATSE is asking the NLRB to rule that IATSE should represent employees recording sound and editing video tape when a mini-cam is used to cover the news.

Ample Article XX precedent establishes that a UC petition constitutes the raid element of a Section 2 case. See General Electric

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6/ This basic distinction between the film process and the electronic process which is reflected in the agreements at WXYZ-TV is something that is common throughout the television industry. As noted by Richard N. Goldstein, former Vice President for Labor Relations for NBC, in the March 1978 issue of the Labor Law Journal (CCH):

> "Essentially, the decision [on assigning PEC work] was premised on the established tradition in network labor relations that technology rather than work function dictates union jurisdiction. Thus, if the technical equipment involved in a production is electronic in nature, it is the province of the engineer; conversely, if film is the medium, then the appropriate IATSE personnel are assigned even if the work involved is much the same."

Company, Case No. 77-57; and, generally, pp. 149-153 of the "Index Digest of Determinations of the Impartial Umpire Under the AFL-CIO Internal Disputes Plan."

C. Relevant Article XX Precedent Under Section 2 Favors IBEW's Position.

Of the several cases decided under Article XX which relate to the PEC, only two were concerned with Section 2. Significantly, those two Section 2 cases also involved the same aspect of electronic news coverage involved here -- sound and video tape. In CBS Studios, Case No. 74-65, the Impartial Umpire found that the IBEW had an established collective bargaining relationship for employees who edited video tape. In ABC, CBS, NBC, Case No. 74-90, the umpire found that the IBEW unit covered the employees gathering sound on video tape. Many facts present in those earlier cases are present at WXYZ-TV. Thus, Cases Nos. 74-65 and 74-90 are the relevant cases.

No doubt, IATSE will cite certain other mini-cam cases: KPIX, Case No. 75-85; KTVU, Case No. 75-90; Metromedia, Case No. 75-114; and WPLG, Case No. 76-43. Reliance upon those cases in a Section 2 decision would be totally misplaced. All were decisions under Section 3 and had nothing to do with the issues and concepts involved under Section 2. Moreover, those cases are factually distinguishable. All involved the portable electronic camera itself, and not the sound or editing aspects. All of those cases related to situations where the PEC had recently been introduced. This is in contrast to our case, where the PEC has been in use for three years, which has been ample time for an established collective bargaining relationship in favor of the IBEW to grow and be entitled to protection. Lastly, the Metromedia case which was decided by the Executive Council dealt with the functional work theory under Section 3. Such a theory has no relevance to a Section 2 case, where focus is upon which union has actually represented the employees involved, and not upon the function of the

work being done. 7/

D. IATSE's Section 2 Allegations Are Totally Unsupported.

IATSE has charged the IBEW with violation of Section 2. Two factors totally refute such an allegation. First, it is the IBEW -- not IATSE -- which has an established collective bargaining relationship that is being interfered with. Secondly, no violation by the IBEW can be found because IATSE has utterly failed to make even a prima facie Section 2 case. IATSE introduced no exhibits, and none of the testimony by IATSE's witnesses addressed issues relevant under Section 2.

Only one thing presented by IATSE at the hearing was even arguably relevant under Section 2. That was a statement that two former IATSE members are now in the IBEW unit. However, that fact does not prove a Section 2 case. IATSE offered no evidence that the switch by these two persons was caused by the IBEW. The fact is, these people came to be represented by the IBEW without any effort or attempt to organize on behalf of the IBEW. It was WXYZ-TV who switched these employees from film to the PECs and placed them in the IBEW unit. It was an independent employer decision. See Anchorage Air Route Control Center, Case No. 71-106; and Acme Markets, Case No. 71-109, and the cases cited therein.

7/ As shown, all of those Section 3 cases are inapposite here, and there is no need for the Impartial Umpire to address those cases or the functional work theory. However, for the record, the IBEW feels that the functional work theory should not be applied in the television industry even under Section 3. The functional work theory requires that the process or method be ignored and the end product or function of the work be used as the controlling factor. The goal of the theory has always been to preserve the historic realities of the industry where the dispute arose. Such a theory is totally inapplicable to the TV industry. In the TV industry the process (electronic versus film) is and always has been essential; it has always been the controlling factor in union relationships. The function (news, documentary, quiz show, etc.) has always been irrelevant. Thus, the use of the functional theory in the television industry flies in the face of the realities of the industry and is counterproductive in the sense of actually upsetting historic and established relationships. See the statement by Mr. Goldstein, supra, at p. 7, n. 6.

In addition, IATSE itself must be deemed to have sanctioned such a switch of people into the IBEW unit and cannot now complain. In the contracts of both IATSE Local 199 and 812, there are provisions which encourage and permit the Employer to relocate IATSE people who have been displaced. IATSE had to realize that the placing of these people in another job could very well mean that they would be placed into a unit where another union was the representative. 8/

IV. IATSE HAS FAILED TO SHOW THAT ITS MEMBERS HAVE EXCLUSIVELY DONE THE WORK IN QUESTION AT WXYZ-TV AND THAT THE IBEW HAS INTERFERED IN ANY WAY WITH ANY WORK OF IATSE MEMBERS.

The charging party carries the burden in a Section 3 case of proving that its members have exclusively performed the work in question. See Potlach Forests, Case No. 62-28; and Bendix Aviation, Case No. 64-43. IATSE has failed to do this. This is certainly true if the work in question is defined, as the IBEW believes it should be, as the editing of video tape and the recording of sound when the PEC is used to cover news. If that is the work, IBEW members -- not IATSE members -- have done it exclusively.

Moreover, even if the work in question is defined differently, as IATSE would prefer, IATSE can still not show the requisite exclusivity. It is presumed that IATSE would prefer the work to be defined as editing and recording of sound for news programming (a functional definition of the work). Nevertheless, it is beyond contradiction that IBEW members have also done the work, even under that definition. This was proven by the testimony of not only the IBEW witness, but both IATSE witnesses too. The clear testimony was that IBEW members have done the work of editing video tape and recording sound for news programming. In short, even if IATSE is correct in defining the work

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8/ See IBEW Ex. 7, 199's Agreement, pp. 14-15, "NEW DEVICES"; and IBEW Ex. 6, 812's Agreement, the second February 20, 1977 side letter.

in a functional sense, it cannot prove the requisite exclusivity.[9/]

Further, IATSE did not offer one scintilla of relevant evidence that the IBEW ever sought, "by agreement or collusion with any employer or by the exercise of economic pressure", to raid IATSE's established work.[10/]

IATSE's Section 3 case also loses much credibility when it is remembered that IBEW members at WXYZ-TV have been working with the PEC and recording sound and editing video tape for over three years prior to IATSE's charges. If IATSE ever had a real case, why didn't it file Article XX charges long ago? Even if such a time lapse does not bar IATSE's case, it does illustrate how ridiculous IATSE's allegations are.[11/]

9/ In respect to exclusivity, this case is quite similar to Great Scott Supermarkets, Case No. 71-32. There, Umpire Cole agreed with Union A in the particular context of that case and held that the work should be defined functionally (cleaning floors) and not by process (mop versus automatic machine). Nevertheless, the umpire found that Union B was not guilty of violating Section 3, because Union A had not exclusively done the work of cleaning floors. Union B members had done it with one process and Union A members had done it with another process. Thus, here, even if the work at stake is defined functionally in terms of news programming, as IATSE contends, it would still have no exclusivity and no case. It is established that IBEW members have also done this work for a long period of time.

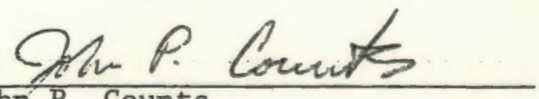
10/ IATSE gains nothing by an argument that recent IBEW collective bargaining agreements are improper "agreements with [an] employer." IBEW's contracts with WXYZ-TV simply reflect historic IBEW work and, as shown above, in no way impinge upon any work which has been the exclusive province of IATSE members.

11/ Of course, this point about the time factor is also true for IATSE's Section 2 allegations.

CONCLUSION

For the above reasons, it is submitted that the Impartial Umpire find that IATSE has violated Sections 2 and 20 of Article XX because of its actions at WXYZ-TV in Detroit, Michigan. Further, IATSE's charges against the IBEW should be found to be without merit.

Respectfully submitted,



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