Argued by
SIDNEY J. FELTENSTEIN,

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New York, N. Y.
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New York Supreme Court

APPELLATE DIVISION — THIRD DEPARTMENT.

In the Matter of the Claim of

WILLIAM MILLER,
Claimant-Appellant,

—against—

THE TREBUHS REALTY COMPANY, INC., Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier,
Respondents,

—and—

RODGERS & HAMMERSTEIN, ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY,
Respondents,

—and—

THE WORKMEN'S COMPENSATION BOARD,
Respondent.

CLAIMANT-APPELLANT'S BRIEF AND APPENDIX

STATEMENT *

This appeal by the claimant brings up for review an award and decision by the Workmen's Compen-

* NOTE: Hereinbelow, references to the Appendix to the Brief will be by serial number; references to the file or Record on Appeal will be so identified.

sation Board *en banc* as well as an award and decision by a Compensation Board Referee; also from the findings of fact and conclusions of law made thereon (Record, pp. 5-7). The issue litigated involves the claimant only indirectly; the real dispute—employment by whom—is between the respective alleged employers and their respective carriers.

This appeal assigns error to all but two of the findings (Record pp. 5-7), necessarily, then in the conclusions of law.

The Referee (Record p. 22) found that

> "* * * the claimant was in fact an employee of the Trebuhs Realty Company at the time of the accident * * *."

On January 12th, 1955 (Record p. 20) an appeal was directed to the Chairman of the Workmen's Compensation Board:

> "* * * from each and every part of the decision aforesaid, and from the whole thereof both upon questions of fact and law."

The Compensation Board denied the application

> "with leave to renew same when an award is made." (Record p. 19.)

The original decision, modified as it was by the Referee's Decision of the 15th day of February, 1955 (Record p. 19) and further modified by the supplemental decision dated April 26th, 1955, was followed by a similar letter to the Board (Application for Review) of the entire decision (Record p. 13) predicated upon the contention that

> "* * * both the original decision and the supplemental award aforesaid were errone-

ous, contrary to the weight of the evidence, contrary to the law, and supported by no competent evidence to justify it * * *." (Record pp. 13, 14.)

The latter appeal resulted in a holding

"* * * That the weight of the substantial evidence amply sustains the Referee's decision that the claimant was an employee of Trebuhs Realty Co., Inc., and we so find * * *." (Record p. 12.)

(That decision was not unanimous: One concurring member of the Board found a special-general-employee-employer relationship between all the parties and carriers; Record p. 12).

EPITOME OF THE RECORD

A.

Claimant, his background, his work.

The claimant for at least the last decade has been a professional musician (Record p. 52); in that general field his specialty is in "show business." His proficiency is attested by his employers. His talents were sought after and used by

"* * * theatre orchestras generally * * *",

—not even excluding the Metropolitan Opera Orchestra (Record p. 51). In addition, he played during the summer months in the Goldman Band (in Central Park), and in orchestras which made recordings (Ex. "A", Record pp. 463-465; Record p. 61; App. Serial No. 8).

In about 1949 he was invited to become a member of the orchestra for a show then about to open at

the Majestic Theatre: *South Pacific.* He played in that orchestra for its four-year run at that theatre. In the late spring of 1953 the producers of that show, respondents Rodgers and Hammerstein, contemplated taking it "on the road" pending a reopening at the end of June of that year (1953) at another theatre. The show opened at the Broadway Theatre on June 29th, 1953 (Record p. 52). The claimant was injured on November 22nd, 1953 during an intermission in the show's performance at the latter theatre.

South Pacific played Boston and New Haven between April and June, 1953. *The claimant was not with the orchestra on that out-of-town engagement.* The claimant's resumption of his playing role after the interruption was not automatic: he was called ("selected", rehired) by one Sol Gusikoff, the "leader" of the orchestra (Record p. 54), a few weeks before the show moved from the Majestic to the Broadway Theatre.

> "* * * Q. Was Gusikoff the man you spoke to about hiring before you were injured? A. Both times. He always engaged us.
>
> Q. I see. What position did he hold? A. He's general musical director for Rodgers and Hammerstein * * *." (Record p. 54.)

Gusikoff conceded him the choice between resuming with the *South Pacific* orchestra or continuing to play in the Goldman Band (App. Serial #5; Record p. 55). Claimant accepted the call by Gusikoff for *South Pacific* (Record p. 55).

His weekly pay at his theatrical work, depending upon certain circumstances, varied between $130.00 and $180.00 a week (App. Serial #5; Record p. 56; Exs. B, C and D).

B.

Relationship between Claimant and the respective alleged employers.

1.

The union as an element in such relationship.

The entire theatrical industry is honey-combed by tentacles of an over-seeing organization protecting the musicians from oppression from above: Musician's Union Local 802 (Record p. 163; App. Serial #39). The union acted generally as an intermediary between musicians and their prospective employers, either theatre owner or producer, as the case might be. [Both the latter groups, have a comparable protective organization which supervise the ethics of the members: The League of New York Theatres (Record p. 219).]

Down through the years it has been the practice of theatre owners and/or producers, and musicians, to contract between themselves so that a protective mantle is thrown around the shoulders of the professional musician. Such arrangements have ordinarily become effective on Labor Day (App. Serial No. 7; Record p. 58).

The arrangement recognizes a disparity between two types of theatre: A "contracted" (signed-up) house, and a "penalty" (non-contract) house (App. Serial No. 6; Record p. 57). A contract house is one in which the list of musicians were guaranteed by a contract between the union and the employer, protection as to pay and vacation (Ex. E; Record p. 469); in the "penalty house" the employer of the musicians, has no such contract. The penalty in effect for this omission was the required hiring and employment of four "house men"—additional musi-

cians who are paid whether they worked or not for that period.

> "Q. What are house men? A. They are signed up men who are engaged for the theatre from Labor Day to Labor Day. These men are paid when the theatre is open whether they play or not. If the show goes into a theatre that doesn't use any music they are paid a salary." (App. Serial No. 7; Record p. 58.)

In the operation and control of the orchestra and its component musicians, the "delegate" who acts as a personal *liason* agent between the members of the orchestra and management, from the point of view of the Union, is the orchestra "leader" (House contractor, or sub-contractor). [This is not to be confused with the orchestra "conductor" the "conductor" supervises the playing of the orchestra.] That "leader" acts as a representative of his employer (App. Serial No. 63; Record p. 228). The orchestra "leader" (House Contractor) is sponsored and employed either by the producer or the theatre owner, depending upon the circumstances (Ex. E; App. Serial No. 65; Record p. 230). If the "house contractor" Leader is not himself a member of the particular orchestra, he delegates authority, or duties to a "sub-contractor" (App. Serial No. 70; Record p. 239), who himself is a member of that orchestra.

Thus, for example, in the *Majestic Theatre* a "contracted" house, the orchestra's leader was one, Schwartz (App. Serial No. 70; Record p. 239). (He was at all times responsible to his employer, Shubert.) On the other hand, the *Broadway Theatre* was a "penalty house"; and there, *the orchestra "leader" was not a Shubert employee but rather an*

employee of the producer (Rodgers & Hammerstein), who had contracted directly with the Union.

> "Q. Now, was that the same situation or was the situation different when the show moved to the Broadway Theatre? A. No, I didn't have to report to anybody. I was the sole boss there.
>
> Q. You were the house contractor? A. That's right. I was the house contractor but I appointed my brother because you don't do much playing as a general rule.
>
> Q. You appointed your brother as what? A. As a subleader, as the subcontractor. He acted on my behalf.
>
> Q. You conferred on him the authority which had been conferred on you? A. That's right, exactly." (App. Serial No. 70; Record p. 239.)

2.

The general power to control the orchestra went further than negotiations with the Union on behalf of his employer.

The alleged employer [Trebuhs], was the owner of the Broadway Theatre (App. Serial #93; Record p. 299). [The corporate name is merely the surname of the principal stockholder (Shubert), spelled backwards.] More than four years earlier than the events hereinbelow described, Rodgers and Hammerstein, theatrical composers and producers, contemplated a musical production on Broadway: that was the show, later to enjoy a fabulous reputation, *South Pacific*. After negotiations a contract was entered into between Rodgers and Hammerstein, and the Shuberts, for the production of that musical play at the Majestic Theatre.

It was not until the end of March, 1953, some four years later, that a move was contemplated. At that time, the Shuberts (owners of the Majestic Theatre), and Rodgers and Hammerstein (producers of the show), apparently coincided in the view that *South Pacific* was beginning to "waste its fragrance on the desert air", and that such reduction in profit might be reversed, if the production were removed to a different theatre.

The Broadway Theatre (also within the control of the Shubert family of corporations), was agreed upon as a suitable showcase for the show. Accordingly, a letter from Lee Shubert, on a letterhead of the Select Theatres Corporation (another Shubert creation), to Alfred Manuti, President of Union Local 802 (Ex. I, p. 478), opened negotiations between the Union and the Shuberts, with respect to *South Pacific* at the Broadway Theatre. The show was to close at the Majestic and reopen after a "road tour", 6-8 weeks later at the Broadway Theatre. Permission was sought to "contract" the Broadway Theatre for the revived run. (By a prior commitment the lessors of the Broadway Theatre [Trebuhs] had rented the theatre to the producers of *Cinerama* for a period terminating on or about the 4th of June, 1953; the renewed run of *South Pacific* was not to commence until, after necessary renovations, the 29th of June. *That application by Shubert was rejected.*)

Not altogether nonplussed by the rejection, the Shuberts sent, together with Rodgers and Hammerstein, another intermediary to the Union to seek reconsideration by the Union (App. Serial No. 40; Record p. 164):

> "Q. Did they appear before you or did they write you? A. Mr. O'Connor representing the Shubert's interest appearing before

> the executive board and requested that we allow them to sign up the Broadway theatre.
>
> Q. Now, the practice as to when business is done in that industry, when is the approximate time of the year when such an application would be made? A. Well, the practice has been from Labor Day to Labor Day, but it's discretionary with the executive board to allow a theatre to be signed up in midseason if they negotiate according to certain terms and conditions."

Shubert's representative on this mission was one O'Connor; Rodgers and Hammerstein were represented by Mr. Jacobs (Record p. 169; App. Serial No. 41).

About a week after the Union's rebuff the same two representatives, accompanied by Sol Gusikoff, appeared again before the executive board of the Union. [Sol Gusikoff was also a Rodgers and Hammerstein employee (Record p. 171; App. Serial No. 43).] Again, Shubert's request for the favor was denied.

Instead, an identical proposition made by Rodgers and Hammerstein through Gusikoff and Jacobs, a proposal which would recognize the responsibility of Rodgers and Hammerstein as employers of the musicians (Ex. E) was substituted. *This offer was accepted by the Union.* In that contract, without which no orchestra would be available for the production at the Broadway theatre, the name "Rodgers and Hammerstein" appears alongside the words "Name of Employer." Morris Jacobs signed on their behalf, as did orchestra leader Sol Gusikoff. That was the third attempt at securing the Union's cooperation (Record p. 175; App. Serial No. 45).

C.

The business relationship between the Shuberts and Rodgers and Hammerstein.

1.

At the Majestic Theatre, where in 1949, the show *South Pacific* had opened, an agreement between the Union and Shubert, had been entered into: Shubert was recognized as the employer of the musicians there. By virtue of some internal change or arrangement, when a different theatre (i.e. Broadway) was in contemplation for the production, both the producer and the theatre owner sought a corresponding change in their relationship with the musicians. This resulted in a series of conferences, all unsuccessful so far as the Shuberts were concerned, which was consummated Exhibit E (Record p. 469). Having refused Shubert, the Union now accepted Rodgers and Hammerstein as employers of the musicians. But there was an additional matter of difference between the musicians and their "employers".

2.

"Vacation money."

An indebtedness under this heading had begun to accrue at the Majestic Theatre (Record p. 177; App. Serial No. 46); it carried over to the Broadway Theatre. It resulted in another appeal to the Union. A Mr. Lund, representing the Shuberts and Mr. Jacobs (representing Rodgers and Hammerstein) appeared before the executive board in reference to that matter.

"Q. Was anything said at that time between—by Mr. Lund in connection with their alleged relationship with Miller? That's, the Shuberts' relationship with Miller? A. Well, it had to do with the accrued vacation; some of it had accrued at the Majestic and some of it had accrued at the Broadway Theatre.

Q. Yes? A. And at that time the question was, who was going to pay that vacation. *Mr. Lund specifically stated that Miller was an employee of Jacobs.*" (Cf. App. Serial No. 55; Record p. 200.)

* * * * *

"By the Referee:

Q. Repeat again, what did Mr. Lund say? A. *Mr. Lund stated that Mr. Miller is not their employee; that he's an employee of Mr. Jacobs, Rodgers and Hammerstein.*" (Record p. 178; App. Serial No. 47.)

The fund was paid into the Union by Rodgers and Hammerstein (Record p. 180; App. Serial No. 48). This was strictly in accordance with the practise in "show business" (Record p. 194; App. Serial No. 50).

3.

Trebuhs Corporation and Rodgers and Hammerstein at the Broadway Theatre.

The Shuberts (or one or more of the corporations controlled by them), owned many, if not most of the theatres in New York City. In the business of maintaining and operating these properties, they

negotiated with producers of shows for leaseholds of one or more of these theatres.

> "* * * Shubert owned the four walls * * *." (Record p. 185; App. Serial No. 50.)

Sometime before the *premiére* of *South Pacific* at the Majestic Theatre, the Shuberts (i.e. one of their corporations—in this case, the Trebuhs), entered into an agreement with Rodgers and Hammerstein (Record p. 300; App. Serial No. 93). In describing the effect of this agreement, Mr. John Shubert, who appeared as a witness at the hearing on behalf of Trebuhs, in an effort to escape an uncomfortable position, talked out of both sides of his mouth at the same time:

> "Q. In other words, you are telling us that the arrangements that you had with Rodgers and Hammerstein at the Broadway was on the basis of pro rata, sharing profits, you got a percentage for your rental, things like that? A. That's right. *It wasn't in other words, a straight rental,* so many thousand. We had nothing to do with it.
>
> Q. You ran the show, Mr.—— A. Oh, no, sir. *It was a straight sharing contract. It was the old contract from the Majestic brought on up.*" (Record p. 315; App. Serial No. 95) (Italics ours.)

But how does that square with the following:

> "A. You see, Rodgers and Hammerstein guarantees, it's a rather small guarantee, 7 thousand dollars a week.
>
> The Referee: That's what I'm asking you, I don't know what situation develops.

A. They guarantee our share will not be less than 7,000 dollars.

The Referee: *That 7,000 dollars they pay you for the use of the house covers what, rent?*

A. *Covers everything.*

The Referee: *The house staff?*

A. *All our expenses that would be involved."* (Record p. 318; App. Serial No. 96) (Italics ours.)

4.

The mechanics of weekly accounting; method of weekly distribution of pay envelopes.

At the Broadway Theater the method of weekly accounting and distribution of pay conformed to the general practice in "show-business." The weekly income ("take") at or through the box office was accumulated for distribution Friday or Saturday night. The accountants (i.e. employee in charge of funds), would make over-all deductions commencing with the $7,000.00 for the use of the theatre; in addition to that deduction, the Shubert management would take off "the top" the total of any money that had been advanced on behalf of the producers by the management during that week. If, after these deductions, any balance were left (Ex. G, p. 473), that balance would be divided so that Rodgers and Hammerstein were to receive "* * * 70 per cent of the first $20,000.00, 75 per cent of the next $20,000.00, and all receipts over and above $40,000.00 * * *" (Ex. G).

The largest single disbursement (re advance) that would be deducted as part of total overhead, was the payment to the musicians for their weekly work (Ex. J). [A typical accounting sheet is included in the record as Exhibit J.]

4(a).

Payment of musicians.

The largest single deduction from part of the weekly "gross" of that show, excluding the salaries for the cast, was for weekly wages to the members of the orchestra. Consequently, we pause to examine how the claimant (a musician) was paid in the regular course of business, by whom and out of whose money, and how he happened to be one of the "selected" musicians playing that show.

Obviously enough, the orchestra that had played three-and-a-half years at the Majestic Theatre, was more or less broken up when that theatre was "shuttered", and the show went "on the road" to reopen six or eight weeks later in another house. The reason for this interruption and hiatus was that the Broadway Theatre had been put under lease to the producers of "Cinerama" until June 4th of that year. And, since it would take several weeks to refit and renovate the theatre to put it into an acceptable condition for *South Pacific*—in view of those considerations, it was decided to take the show on the road for that interim period.

Not more than 15 of the orchestra's complement of 22 men were taken "on the road" by the touring company (App. Serial No. 69; Record p. 237). Among the musicians who did *not* go on the show's out-of-town engagement was the claimant (Ex. E).

When the touring company returned to this City, in early June of 1953, a full orchestra had to be reconstituted.

The particular instrumentality to "select" the necessary musicians for the production at the new theatre was Sol Gusikoff, house contractor for Rodgers and Hammerstein (App. Serial No. 70A, Serial No. 66).

"Q. Now, in connection with your relationship in Rodgers and Hammerstein, what were your duties? A. I engaged people for them, musicians for their shows.

Q. You selected them? A. I selected them. * * *" (Record p. 21; App. Serial No. 66)

It happened that in this particular production the "house-contractor" was not a member of the orchestra: consequently, in order that there would be someone in authority in the orchestra at all times, the house contractor (Gusikoff), deputized his brother David Gusikoff, a member of the orchestra, as "leader" ("sub-contractor").

"Q. Now, was that the same situation or was the situation different when the show moved to the Broadway Theatre? A. No, I didn't have to report to anybody. I was the sole boss there.

Q. You were the house contractor? A. That's right. I was the house contractor but I appointed my brother because you don't do very much playing as general rule.

Q. You appointed your brother as what? A. As a subleader, as the subcontractor. He acted on my behalf.

Q. You conferred on him the authority which had been conferred on you? A. That's right exactly." (App. Serial No. 70; Record p. 239)

As *liason* between the musicians and the producers, considerable authority was vested in the "house leader." For example, if any of the musicians were guilty of an infraction of a regulation, complaint would have to be made to Dave Gusikoff, the orchestra "leader". If such infraction was a

major one, serious enough for disciplinary action, the only man with the power of discipline or dismissal (subject to the union's overlordship) was Dave Gusikoff—Rodgers and Hammerstein employee (App. Serial No. 70; Record pp. 239-242).

Simply because some of the musicians who had played the Majestic Theatre engagement were again selected for the Broadway Theatre orchestra did not transform the rehiring for the revival as automatic:

> "Q. Where, at the Broadway Theatre? A. Not the Broadway Theatre.
>
> Q. I'm speaking about the Broadway Theatre.
>
> The Referee: Let's get down to the Broadway Theatre.
>
> A. I booked all the men at the Broadway Theatre. I took them over rather from the Majestic.
>
> Q. Yes. A. I think four more men had been engaged because the house men had to be left behind at the Majestic Theatre." (App. Serial No. 70; Record p. 243)

The only token of employment by the Trebuhs Realty Company, Inc. upon which the respondents base their claim, was the payment of wages; that too was the foundation of the decision, award and findings (Record p. 12). Claimant does not deny that checks, for the weekly wages of the musicians were drawn against the account of the Broadway Theatre by Scanlon, the house manager (Exs. B, C and D). The execution of the checks was a mere clerical function.

But to whom were they drawn? In what manner were they distributed? Just a few days before

the opening of the production, Gusikoff ("house contractor" for Rodgers and Hammerstein) handed to Scanlon a list of names of members in the orchestra; *it was by that list and the amounts set down alongside each musician's name that Scanlon was guided.* Scanlon, however, either did not know the identity of the persons whose names appeared on the list, or was restricted by custom or by rule to the draftsmanship entailed in the utterance of the checks: Scanlon not only did not know any of the musicians on the list, but did not, himself, even turn over the checks to the individual musicians. He delivered the sheaf of checks to the "house leader" who, in turn, distributed them according to name (App. Serial No. 72; Record p. 246).

> "Q. Now, who would furnish the list of the musicians who were to be paid each week? A. Paid by whom?
>
> Q. Whoever paid them. A. And where?
>
> Q. At the Broadway Theatre. A. Well, they're on the payroll. I made up the payrolls and it was given to——
>
> *By the Referee*:
>
> Q. (Int'g) *Who do you give the payroll to?* A. To give it *to my brother and my brother gives it to the house manager.*
>
> Q. *And the house manager* takes it out of the box office and paid the salaries? A. He *gives it to the house contractor;* that's right.
>
> Q. And gives the list of the men? A. And what salary, whatever they get and it's paid every Thursday or Friday.
>
> Q. That's the mechanics of it? A. That's right. * * *" (App. Serial No. 72; Record p. 246) (Italics ours.)

> "Q. Was it your brother, who actually handed the men the checks or cash, whatever it is? A. That's right." (App. Serial No. 73; Record p. 247)

This arrangement about payment from the Broadway Theatre naturally imposed upon the draftsman of the check the obligation to deduct from the sum paid, social security and withholding taxes; all available funds were collected and disbursed by the box office manager. It was Scanlon who signed the checks; it was Scanlon who turned the checks over to David Gusikoff. Consequently, the logical and last step prior to the actual transmission of the checks to the musicians was the clerical act of deducting the taxes from the gross wage.

Not only did the check to each musician in payment of weekly earnings (Exs. B, C, and D) fail conclusively to establish the identity of the employer, but the very opposite seems to obtain. It is instructive to ascertain how these musicians got their names on the list by which Scanlon was guided; how and in pursuance of what authority Gusikoff had the right to name them. The answer to this line of inquiry goes back to the contract between the Shuberts (Trebuhs) and Rodgers and Hammerstein (Ex. G; Record p. 473). Appearing on page 475 is a rider physically part of Exhibit G. By the terms of that rider, the Shuberts (Trebuhs)

> "* * * agree to furnish twelve musicians and share with the party of the second part (Rodgers and Hammerstein), on ten (10) musicians at the local union minimum rate on the pro rata share of the terms of the contract.

> The party of the first part (Trebuhs) agrees that the party of the second part (*Rodgers and Hammerstein*), *shall have the right to select all the musicians for this production with the exception of the four (4) house men.*" (Italics ours.)

There, whatever doubt may have existed as to the authority of Gusikoff to "select" men of his own choice (or the choice of Rodgers and Hammerstein) as members of the orchestra for that show, is dissipated. Whatever right or authority the Shuberts had to make such selection, was thus by voluntary release or waiver, abandoned to Rodgers and Hammerstein.

THE SINGLE ISSUE PRESENTED BY THE RECORD

In contrast to the usual contest before the Compensation Board Referee, the present controversy is not between employer and employee (as supervised by the Workmen's Compensation Board). The question of whether compensation benefits may be awarded to the claimant (except for the third-party suit) does not arise here. The claimant must concededly be successful in his claim—but against whom?

Since damages under the Workmen's Compensation Law can only be assessed against and collected from the employer alone upon a proper showing, a third-party suit can be maintained, as the descriptive title implies, against only such a person who at one and the same time is the author of the negligent conduct responsible for the claimant's injuries, but who at the same time is not the claimant's employer.

Consequently, the sole issue presented as between the two alleged employers, Trebuhs Realty Company, Inc. and Rodgers and Hammerstein, which was the true legal employer?

POINT I

FINDINGS OF FACT (#1, 2, 5, 6, 7) WERE CONTRARY TO THE EVIDENCE AND/OR CONTRARY TO LAW, AND WERE MADE BY THE REFEREE WITHOUT JUSTIFICATION IN THE RECORD.

Finding number 1 (Record p. 6) reads as follows:

> "On November 22, 1953 the day on which William Miller was accidentally injured, he resided at 621 Carroll Street, Brooklyn, New York and *was employed as a musician by Trebuhs Realty Company, Inc.,* the lessors of the Broadway Theatre, 234 West 44th Street, New York, New York."

This Finding, so-called, serves merely to introduce a proposition which is common to others that follow. Thus, for example, when Finding number 2 says:

> "On November 22nd, 1953, while William Miller was *working for his employer* * * * " (Record p. 6),

the basic question is prompted: Who was his employer at the time? *

Again in Finding number 5, the Workmen's Compensation Board, together with the Referee, implies that the finding that employment of Miller was by

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* NOTE: Findings No. 3 and 4, in the larger view, are immaterial here: they present no controversial conclusions.

Trebuhs Realty Company, Inc.—*sic*—depends for its conclusiveness on the evidence that

> "* * * Trebuhs Realty Company, Inc., paid William Miller's salary and deducted social security and withheld taxes."

(The same Finding refers to a sum involving pay for a disputed vacation period.) On that subject the undercurrent theme to Finding number 5 says:

> "It also paid William Miller for his disputed vacation period and had the right to take disciplinary action against him for rule infractions."

Findings 6 and 7 are complementary: both suggest that Miller's employment was a foregone conclusion, that Trebuhs Realty Company, Inc. was his employer, since the only employees of Rodgers and Hammerstein were members of the cast of "South Pacific."

These Findings of Fact depend for their integrity on but a single contention: That the employer-employee relationship depends solely on the source of the money and the physical identity of the donor. But any such contention is fatuous: The universally accepted rule controlling the fact in the cause at bar is stated in *Braxton* v. *Mendelson,* 233 N. Y. 122. There, defining the employer-employee relationship, the Court of Appeals said:

> *"Ordinarily no one fact is decisive. The paying of wages, the right to hire or discharge; the right to direct* the servant where to go and what to do * * * none of these things gives us an infallible test. Any or *all of them may be considered."* (Italics ours.)

The courts of other states, have adopted this rule too.

> "The test lies in the question of whether the contract reserves to the employer the *power of control of the employee.*" (Italics ours.)
>
> *Railway* v. *Bennett,* 36 Oklahoma 358, 20 A. L. R. 578.

In further disparagement of the dogma subscribed to by the alleged employers, and reappearing in the Findings of Fact now here for review, is the case of *Wyllie* v. *Palmer,* 137 N. Y. 248, from the opinion in which the following sentence is culled:

> "The *true test* as to whether the relation of master and servant exists *is not necessarily the payment of wages, but is whether at the time of the injury* complained of *the alleged servant is engaged in the business of the alleged master, and subject to his direction and control. It is not so much the actual exercise of control which is regarded as the right to exercise such control* * * *." (Italics ours.)

Cf. also *Baldwin* v. *Abraham,* 67 N. Y. S. 1079, aff'd 171 N. Y.

Whatever else the memorandum of decision and findings of fact had to say (Record pp. 6, 7), but one common thesis protrudes: That the payment of wages and the deduction of social security and withholding tax by Trebuhs, is alone conclusive support for those findings. [To claim that would be to fly in the face of rigorous and established juridical pronouncements (cf. *supra*) con-

stituting the basis of master-and-servant law.] The least that can be said is that the rule of *Braxton* v. *Mendelson* (*supra*), is inconsistent with the findings of fact and conclusions of law of both Referee and the Workmen's Compensation Board. That of itself, should be sufficient completely to destroy the fabric of which the findings of fact are constituted.

But that is not all: The actual payment of wages —even were that one factor controlling—was under circumstances which defy any such interpretation as the decisions by Referee and Board propose. The money taken in during the run of the show, naturally enough, comes into the box office. (And this is without factual significance.) At each performance we find a Mr. Scanlon, the house (box office) manager. He was an employee of Trebuhs Realty Company, Inc. And, since the distribution of the money to various persons and places was a step to be taken after the weekly gross income had been collected and accounted for, it stands to reason that the money so collected (by Scanlon) would be turned over to that agency (Trebuhs Realty) which was by agreement to be the accounting or distributing agency. [A part of that sum it was to retain itself.]

As part of this accounting would be included the salaries of musicians (Ex. J; Record p. 479). They were paid weekly (Record p. 380; App. Serial No. 110). Other disbursements (e.g. billboards, stage hands, etc.)—these too were advanced out of the receipts from the box office; that was where the money to defray expenses in the production would naturally come from.

Each Saturday night, or at least once a week, an accounting was had (Record p. 110; App. Serial No. 380).

> "Q. And that would be the gross for the week? A. Yes, sir.

Q. And what would Scanlon do, what is he supposed to do with it? A. He's supposed to divide up that money between the theatre and the production and also he has to pay the salaries of the employees.

The Referee: The whole payroll?

A. And various other——

The Referee: The payroll and other expenses, house expenses and everything else?

A. Correct, yes, sir. * * * " (Record p. 381; App. Serial No. 110)

Considerable light is shed on this disorder and confusion, when an investigation in respect of musicians turns up the very disturbing proof that Scanlon had one function and one function only: physically to fill in the appropriate spaces on the blank check (Exs. B, C and D). It is obvious from an examination, that both the payee's name and the signature of the draftor are in the same handwriting. If this creates the appearance of superior-inferior in the hierarchy of that theatre, it is a false and misleading symbol. Scanlon was never a party to any selection or naming of the members of the orchestra. The checks were drawn individually to the musicians. Where did he learn their names? Who originally designated the musicians to be paid? The answer to this certainly does violence to the Findings of Fact Nos. 1, 2, 5, 6, 7. The list of names as to the individuals in whose favor checks were to be drawn, were received by Scanlon from one of the Gusikoffs; they in turn distributed the checks (Record p. 246; App. Serial No. 72):

"Q. Now, who would furnish the list of the musicians who were to be paid each week? A. Paid by whom?

Q. Whoever paid them. A. And where?

Q. At the Broadway Theatre. A. Well, they're on the payroll. I made up the payrolls and it was given to——

By the Referee:

Q. (Int'g) Who do you give the payroll to? A. To give it to my brother and my brother gives it to the house manager.

Q. And the house manager takes it out of the box office and paid the salaries? A. He gives it to the house contractor; that's right.

Q. And gives the list of the men? A. And what salary, whatever they get and it's paid every Thursday or Friday.

Q. That's the mechanics of it? A. That's right."

Scanlon did not even enjoy the dubious pleasure of turning the checks over to the individual musicians himself (Record p. 247; App. Serial No. 73): he did not know them!

"Q. Was it your brother, who actually handed the men the checks or cash, whatever it is? A. That's right." (Cf. also App. Serial No. 77; Record p. 258.)

This irrefragable testimony has the immediate effect of casting a shadow of suspicion over the contention that the musicians were paid by Trebuhs as employees of Trebuhs. Nor is that all. The right to name the individuals constituting the orchestra naturally belonged to the person or persons in whose employ the musicians would play. As a buffer to misunderstanding a quick survey turns up evidence pointing to a more accurate solu-

tion (Record p. 475; Ex. G). The first sentence of that rider says:

> "The party of the first part (Trebuhs) agrees to furnish twelve (12) musicians and share with the party of the second part (Rodgers and Hammerstein), on ten (10) additional musicians at the local minimum rate at the pro rata share of the terms of the contract * * *."

That would seem to imply that at least half the cost for the orchestra was borne by Trebuhs Realty. But the succeeding paragraph immediately dispels any such idea:

> "The party of the first part (Trebuhs) agrees that the party of the second part (*Rodgers and Hammerstein*) *shall have the right to select all the musicians* for this production with the exception of the four (4) house men. * * *" (Italics ours.)

Further illumination is found on the face of the contract (Record p. 473; Ex. G):

> "The party of the second part (Rodgers and Hammerstein) is to receive seventy (70) per cent of the first $20,000.00, seventy-five (75) per cent of the next $20,000.00, and all the receipts over and above $40,000.00 weekly. * * *"

That cogently indicates—Trebuhs to the contrary notwithstanding—that even on the subject of wages for musicians, it was Rodgers and Hammerstein who shouldered almost the entire burden. That the obligation for musicians' wages was not assured by Trebuhs Realty Corp. out of the agreed $7,000.00, appears in the following paragraph:

> "The party of the second part guarantees to the party of the first part that the party of the first part's (*Trebuhs'*) *share of the gross receipts each week shall not be less than the sum of $7,000.*" (Ex. G; Record p. 473.)

The weekly payroll for musicians at the Broadway Theatre (Record p. 479; Ex. J), was upwards of $4,200.00. If Trebuhs were responsible for the payment of that sum out of its share of the gross "take," how can we account for the figure in the lower left-hand corner of Exhibit J: "House ($)7,000."? *And that alone is the basis of the decision appealed from.*

The accounting figures indicate that payment of musicians was not a Trebuhs disbursement at all: It came out of gross income. And since Exhibit G (Record p. 473) assures to Rodgers and Hammerstein 70% or more in a sharply ascending scale, the only conclusion possible is that the focus of the decisions and awards appealed from was not a valid premise upon which an employer-employee relationship could with precision be assigned; any such claim lacks both objectivity and persuasiveness: The Record fails to sustain the point of view adopted in the findings of fact (Record pp. 5-7). This factor, even standing alone, signifies that Rodgers and Hammerstein were not the paltry benefactors of a small portion of the musicians' salaries, but rather the source of 70% or more of every dollar paid out.

The inescapable inference then is: that on the phase of wages alone, Trebuhs was not the source of payment except to a very minor extent. And since the payment of wages and deduction of taxes was the only criterion from which respondents

claim the relationship of employment could be inferred, the Trebuhs Realty Company, Inc., has failed in its argument.

As a subdivision of the preceding point, the question of "vacation" money may throw additional light. It was claimed at one point that part of the unpaid vacation money, so called, was earned at the Majestic Theatre prior to the transfer to the Broadway Theatre, and part was earned at the Broadway Theatre (Record p. 200; App. Serial No. 55):

> "A. The question of fulfillment of certain number of weeks at the Majestic because part of the vacation was at the Majestic and the other part was at the Broadway Theatre."

In the negotiations between the producers, the theatre owners and the union, a Mr. Lund appeared at a hearing before the union's executive board on behalf of the Shubert interests (Record p. 177; App. Serial No. 46). At that hearing, *Mr. Lund disclaimed any employer-employee relationship between the complaining musician* (claimant) and Trebuhs (Ex. H; Record p. 427). If the responsibility for the payment of wages for musicians fell upon the Shuberts (Trebuhs), the accounting (Ex. J) would indicate a practical bankruptcy of the "House": Out of gross receipts of $23,400.00 odd dollars, the sum of $7,000.00 plus 30% of the excess over $20,000.00 — $1,000.00 — would make a total revenue of about $8,000.00. The 22 musicians earned a total of $4,200 odd dollars weekly. If the Shuberts were individually responsible for that disbursement, the total to which they would be entitled would not be $8,000.00 minimum, but $3,800.00 minimum, and that is contrary to the

language of the contract (Ex. G; Record p. 473). Out of that $3,800.00 would have to be paid the real "house" employees (stage hands, ushers, etc.).

The only criterion tending to establish at all the existence of that relationship between Trebuhs and musicians falls far short of its target. Since by rule of law that single element does not alone automatically establish such a relationship, then it would seem relatively simple that, failing any other factor, the finding of employment by Trebuhs is without justification (Record pp. 5-7). Any such finding is contrary to the evidence.

Antecedent to the payment of wages even for the first week was, naturally enough, the created existence of the employee-employer relationship. We are met by the claim of Trebuhs, that since it paid —(?)—the claimant his wages and deducted from the amount withholding and social security taxes, that, *ipso facto,* Trebuhs was his employer. That group of financial arrangements had, if the tenet hereinabove be true, to be preceded by the establishment of a relationship that would entitle the servant (agent, employee earnings) to payment *quid pro quo.*

On the scale of justice, the proof is heavy though unilateral, that no matter what may have been the agreed rights of the respective alleged employers (respondents) before, the relationship between the Trebuhs Realty Co., Inc., Rodgers and Hammerstein, and the plaintiff are substantially fixed and completely isolated therein (Ex. G; Record p. 475):

> "The party of the first part (Trebuhs) agrees to furnish 12 musicians and share with the party of the second part (Rodgers and Hammerstein) on ten additional musicians at the local union minimum rate at the pro rata share of the terms of the contract."

> "The party of the first part agrees that the *party of the second part* (*Rodgers and Hammerstein*) *shall have the right to select all the musicians for this production* with the exception of the 4 house men. * * * " (Italics ours.)

Miller was no houseman. One of the indicia—and that a very important one—of employment by one master or another, is the right to hire in a free market. The contract gives to Rodgers and Hammerstein the right to "select" all the musicians of the orchestra, excepting only the house men, despite the Shuberts undertaking to defray part of the cost of their wages.

It would seem—aye, it is true—that when the power of hiring is discussed, among the foremost is the power of selection. It would be foolhardy and certainly a waste, if the person who has the right to "select" could be overridden by some person who has not such power. Lacking the veto power over selections (except house men) made by Rodgers and Hammerstein, it is self-evident that substitutions or *replacements* for any cause could be effected only by the *selector — Rodgers and Hammerstein.*

Another facet of probative value in our search, would be the power to "fire," *i.e.,* terminate the relationship. That could be done only by Dave Gusikoff (Record p. 252; App. Serial No. 75; Record p. 254; App. Serial No. 76). Dave Gusikoff in all transactions involving the orchestra in the Broadway Theatre, represented Rodgers and Hammerstein and acted as the leader (intermediary) between the orchestra union and Rodgers and Hammerstein (Record p. 250; App. Serial No. 74). As a matter of fact the four house men at the Majestic were replaced for the show at the Broadway

Theatre by Sol Gusikoff (Record p. 245; App. Serial No. 71). For infractions of rules or violations of the proprieties it was the house contractor (*i.e.,* leader: Dave Gusikoff) who could enforce punishment (App. Serial No. 70A). The musicians were protected from an arbitrary exercise of this power to fire, by the terms of the contract between their "employer" (Rodgers and Hammerstein) and the union (Ex. E; Record p. 469):

> *"The employer shall at all times have complete control of the services which the employees will render* under the specifications of this contract. *On behalf of the employer the Leader* (i.e. Dave Gusikoff) *will distribute the amount received from the employer* to the employees, including himself, as indicated on the opposite of this contract, or in place thereof, on *separate memorandum submitted to the employer at or before the commencement of the employment* hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. *The employer hereby authorizes the Leader on his behalf to replace any employee* who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. * * * " (Italics ours.)

The producers (Rodgers and Hammerstein) authorized Morris Jacobs and Sol Gusikoff to act for them—not for the Trebuhs Realty Company, Inc. (Ex. F; Record p. 472). Jacobs and/or Sol Gusikoff delegated a part of their powers to Dave

Gusikoff, and it was to him that appeals for disciplinary action or "firing," subject to the rules of the union, had to be made (Record p. 249; App. Serial No. 73; Record p. 254; App. Serial No. 76; Record p. 216; App. Serial No. 59).

> "A. We call a man a leader. He's not the conductor. There's a conductor who conducts the orchestra. The leader is the one who hires. We call him a leader of personnel. He hires and fires the men. * * *" (Record p. 216; App. Serial No. 59.)

[The "Leader" at the Majestic Theatre was an employee of the Shuberts: That was a contracted theatre. (Record p. 218; App. Serial No. 60.)]

The power to hire and to fire are concomitantly the privilege of the same individual: The true employer. But when that power either to hire or to fire is subject to veto by some other party, then that power to hire and/or fire loses much of its force. Any such division of authority contains within itself the power of self-destruction. But in the cause at bar, the power to hire and fire are both subordinated to the power to "select." For example, the representative of Rodgers and Hammerstein could name (or designate or "select") 22 musicians; it was not within the power of Trebuhs Corporation or any of its representatives to override that selection or to veto it. By the same token, once having been selected as musicians by Rodgers and Hammerstein, the musicians' tenure of the moment could not be arbitrarily terminated by the Trebuhs Realty Company, Inc. The musicians were protected by the union. To accomplish that firing, a complaint would have to be registered with the leader of the orchestra (Dave Gusikoff), who in turn would

either pass on it himself, or confer with the higher *echelons* of the union's hierarchy.

There remains now only a consideration, not of the situs of the legal control but of the focus of the *power to exercise such control,* whether exercised or not. That is strictly in accordance with the authorities hereinabove referred to.

> " * * * It is not so much the actual exercise of control which is regarded, as the right to exercise such control * * *." *Wyllie* v. *Palmer, supra.*

Since the payment of wages (*cf. supra*) is only one of a number of considerations which lead to the conclusion of "employment" (and the sole ground assigned by respondents for declaring claimant an employee of Shubert) and since the right to direct, the duty to pay, the right to select, hire, and/or discharge, were all burdens, not of Trebuhs, but of Rodgers and Hammerstein, any other finding would be arbitrary and insupportable.

The suggestion of employment by Rodgers and Hammerstein is like a recollected aroma growing out of these facts. Now we may consider as additional criteria the conduct of the parties in the light of the existing circumstances.

In the contract between the musicians' union and Rodgers and Hammerstein, the latter are designated employers of the 22 musicians appearing on the reverse side of the agreement. At the bottom of page 469 (Record) alongside the word "employer" Rodgers and Hammerstein have set their names (they acted in that transaction through Morris Jacobs and Sol Gusikoff) ; both affixed their names to the same paper. Their authority to take such steps has been certified (Record p. 472). Self-serving admissions need not be accepted at their

face value; the use of the expression "employer" by Rodgers and Hammerstein, under the circumstances under which that document, Exhibit E, was born, bars any charge that the statement is self-serving; on the contrary it would appear to be against interest. But whichever it be it is especially fortified by two facts: A. The union declined to sign a similar contract with the Shuberts, and B. When Lund appeared before the executive board of the union, he, on behalf of his employer, Shubert (Trebuhs), disclaimed any such relationship between Shubert and the musicians.

There is still an avenue of consideration. At the Majestic Theatre, the musicians were regarded as employees of the Shubert interests (a contracted house), excepting only the period that the show was "on the road." Between the closing of the "run" at the Majestic Theatre and the resumption at the Broadway Theatre, the claimant's employment was continuous. (N.B. This continuity of *employment* is not synonymous with continuity of *employer.*)

When the subject of the transfer from one theatre to another of *"South Pacific"* came under discussion, if the continuity of the employment were synonymous with continuity of employer, *there would be no necessity for another contract* (Ex. E; Record p. 469). And, since Trebuhs undertook the effort to secure to itself an agreement such as Exhibit E in which it would be named employer—a step which was refused by the union—then Trebuhs apparently recognized its transformation from one label to another.

This idea is carried further by Exhibit H (Record p. 477), where the objective that had been denied them in April, was granted them in December for a period commencing after the run of *South Pacific* closed at the Broadway. The latter ex-

hibit names the Broadway Theatre by J. J. Shubert as employer, and as orchestra leader Morris Gusikoff.

If the identity of employer and employment of the entire orchestra at the Majestic Theatre continued identical and unchanged into the Broadway Theatre, where Rodgers and Hammerstein claimed to have been employers of the musicians—then *why this new agreement naming Shubert as employer?* (Exhibit H.) This document seems to contain a reversion to the Majestic relationship between the Shuberts and the musicians. At least the contract indicates a change in the condition or relationships from Exhibit E, a similar contract-blank, which names Rodgers and Hammerstein as employer.

This means simply that sandwiched in between the Majestic Theatre engagement and the close of *South Pacific* at the Broadway Theatre for some other production—a period of about 8 or 9 months —an employer-employee relationship was built up between the musicians and the producers rather than the musicians and the theatre owners. It is self-evident that both Rodgers and Hammerstein and Trebuhs Realty recognized that a change of some sort was being undertaken when Exhibit E was negotiated for and signed.

These two arguments lead inevitably to a single conclusion, that Findings Nos. 1, 5, 6 and 7, as well as the award thereunder, were all contrary to the evidence and completely without support in the record.*

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* NOTE: While this dispute between the parties must be without prejudice as against the employee-claimant—since one or the other of the alleged employers will be responsible for the payment of an award to the claimant—this proceeding is not academic.

POINT II

THE RULING OF LAW AND AWARD (RECORD ON APPEAL, P. 7) WERE CONTRARY TO LAW.*

It is only by consideration of a number of different factors (*not* excluding the source of wages altogether) that the legal relationship employer-employee can be weighed and exposed. On the other hand, by emphasis and/or generous resort to legalistic legerdemain, essentially the assignment of or reliance on imposing but impertinent catchwords ("payment of wages", and "deduction of taxes"), Trebuhs, the alleged employer, seeks escape from the recognized liability, an acceptable mold in which, because of the proofs (cf. *supra*) this case is cast.

In principle, word-dropping is a self-serving practice adopted by some as a means of diverting attention from the main theme.

> *Horowitz* v. *The Daily Mirror,* 258 N. Y. Sup. 39; aff'd 261 N. Y. Sup. 989; Leave to appeal denied 262 N. Y. Sup. 919;
>
> Cf. also, *Ritter* v. *State,* 122 N. Y. Sup. 2d 339.

Solution is not to be found in a resounding word or phrase: the only true criteria of employer-employee relationship must derive from the practice, conduct, acts and deeds of the respective parties as between themselves, self-serving declarations elsewhere appearing to the contrary notwithstanding.

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* NOTE: Findings No. 3 and 4 are innocuous. They are not of any significance.

Where an honest difference in interpretation of an agreement may appear insuperable, its terms, or even the conduct of the parties of by-passing, waiving or disregarding altogether provisions thereof, a mere epithet favoring one or the other cannot alone be expected conclusively to resolve the ambiguity. Of course, the description employed by the parties cannot be completely ignored.

Singer Manufacturing Company v. *Rahn,* 132 U. S. 518;

Postal Telegraph v. *Morell,* 180 Kentucky 52, R. A. 1918 D 317;

Herman v. *Western Union,* 231 App. Div. 298; 246 N. Y. S. 609;

Matter of Glielmi, 254 N. Y. 60;

Dickman v. *Whitney,* 121 Washington 157;

Auer v. *Refining Co.* 137 Atlanta 555, 54 Ark. 236;

Nalli v. *Peters,* 241 N. Y. 177.

Illustrative of these apothegms, an examination of one or more of these authorities may prove helpful. In the *Matter of Glielmi,* the alleged employee had but recently been taken on as a milk (route) salesman by the respondent milk company. His job consisted in taking a wagon-load, milk in bottles, on his truck—a load for which he paid in advance. He had the power to collect cash or to extend credit on behalf of the respondent. He could return any part of the load unsold and be reimbursed for his outlay. Notwithstanding evidences of independent enterprise, it was held that the relationship of employer-employee existed between the milk company and the salesman. It was Mr. Justice Car-

dozo of blessed memory, who in that case spoke so of this relationship:

> "On the one side there is an intimacy of control and on the other a fullness of submission that imports the presence of a 'sovereign' as the master." (Cf. *supra.*)

The cause at bar yields on analysis to the impression that as between Rodgers and Hammerstein and the claimant a much stronger case is made than even in the authority cited: the phrase "independent contractor" did not outweigh the facts.

The rule has been universally accepted as dogma. Cf. also, *Braxton* v. *Mendelson, supra.* If the true relationship of employer-employee existed between Rodgers and Hammerstein and the claimant, and not between Shubert (Trebuhs) and the claimant, then it is evident that the Workmen's Compensation Law was not the controlling rule of law as between Shubert and the claimant; if Rodgers and Hammerstein were the legal employers—as it is submitted they were—the defense of Workmen's Compensation Law would be available only to the employer—Rodgers and Hammerstein. It is only the employer, by that statute, who is affected. This analysis and exposition proves that the concurrent factors [power to hire (select), fire, direct and control]—all phases of the relationship on the side of Rodgers and Hammerstein—unequivocally pointed to them as the true employer. The participation of Trebuhs in part payment of wages of some of the musicians under the formula hereinabove given is not adequate to destroy the case law judicially pronounced everywhere.

Inasmuch as the conclusion of law (and award) in the cause at bar depends entirely upon the integrity and propriety of the findings of fact, the

conclusion of law reached by the Referee, the Workmen's Compensation Board, *en banc,* are insupportable: The conclusion of law (Record p. 7), is consistent only with the findings of fact (Record p. 5). Those Findings, however, are inconsistent with the overwhelming weight of evidence. Consequently, the conclusion of law is erroneous.

The available case law to which the practice of "word-dropping" as a substitute for proof, is repugnant, offers a very interesting and at the same time, cogent illustration (*supra*). In *Horowitz* v. *Mirror* (*supra*), a newspaper publisher recruiting aid for its delivery service, entered into a "contract" with the alleged owner of a truck for the delivery and transportation of various editions of its paper. In the contract, the truck owner was denominated "independent contractor." The work to which he was assigned was inconsistent with that description. For example he reported to work each day at the same hour, was paid at a daily rate by the week, worked exclusively for that paper only, delivered papers, edition by edition, to the newsstands, and himself enjoyed the discretion bestowed on him by his immediate superior, to exchange unreturnable copies for returnable ones, as well as extending credit or collecting cash from the various newsstands. Under these circumstances, the foreman of the paper was held to have the right and power to direct and control this so-called "contractor" in the work he actually performed in the service of the paper. The contract's name-calling ("contractor") yielded to the law's own descriptive phrase *"respondeat superior."*

However, we are mindful too, of the authority relied on below by the respondent as decisive in the cause at bar. In the *Matter of Lewis* v. *St. Regis and Music Corporation,* 261 App. Div. 856, aff'd 287

N. Y. 598, as well as *Dennison* v. *Peckham,* 295 N. Y. 598; these authorities were cited by the respondent in support of its position that Trebuhs was the true employer of the claimant. Objectively viewed both those cases are so distinguishable on the facts that the law controlling them is far removed from the facts in the cause at bar.

In the *Matter of Lewis, supra,* the Music Corporation of America, had placed under contract a group of performers, of which the claimant was one; altogether the group constituted an "ice show". That corporation negotiated with the hotel St. Regis to furnish or supply the hotel aforesaid with an "ice show"—this very "package". Among the performers in this group was the claimant. By the terms of the agreement between the Music Corporation of America (i.e. the booking agent), and the hotel, the hotel agreed and undertook to supply and be responsible for all costumes for the performers; the Music Corporation of America (booking agent) was to pay the artists out of the money paid by the hotel to the M. C. A. as rental, at the rate of $300.00 a player. The booking agent (M. C. A.), after whatever deductions, including its own fee, had to be made, turned the balance over to the artists. The hotel had a further privilege: After a two-week trial, the hotel was granted the right to discharge (fire) not only the claimant, but in fact any of the members of the "package" (group).

On this state of facts, the Referee (affirmed by the Appellate Division and the Court of Appeals) found that in spite of the general contract between the artist—claimant and the Music Corporation of America (Booking Agent), so many of the elements or factors of control, had actually been set over and assigned to the hotel that the full authority had been effectively divided between them. The Court

of Appeals found that the ultimate "power to control" by the employer was shared between the two respondents.

But the mandate of the Court of Appeals (*Braxton* v. *Mendelson, supra; Baldwin* v. *Abraham, supra*), postulates that the employer in the ultimate analysis is he who has the power to control. *Wyllie* v. *Palmer, supra.* In the *Lewis* case, *supra,* that power was shared fairly equally between both booking agent and hotel; hereinabove it has been demonstrated that in the instant case, it was only one phase of the relationship as to which the respondents claimed responsibility: the "payment of wages" and "deduction of taxes". *And even as to that factor, the role of Trebuhs was not a considerable part.*

The factual characteristics of the *Lewis* case, point the way to the distinguishment. The parties in that case were not the artist and one of two alleged employers: the parties were the booking agent (M.C.A.) and the Hotel St. Regis (alleged employer). *Whatever the arrangement between M. C. A. and the artist, the booking agent sold the entire "package" as a unit to the Hotel.* In this respect the relationship of M.C.A. to the Hotel was analogous to the relationship between the Union and Trebuhs in the cause at bar. (Rodgers and Hammerstein were not booking agents); nor were they representatives of the musicians, (Cf. *supra*). Further, the contract between Rodgers and Hammerstein and Shubert (Trebuhs), was the mere rental of the theatre ("four walls"). The hotel in the *Lewis* case, *supra,* did not rent space to the M.C.A. for the production of an ice show; on the contrary, the hotel purchased from the M.C.A. the entire show, musician, artists, etc. included, as a *unit.* If, in the place and stead of the

Hotel, the Shuberts had been a party and if in place and stead of M.C.A. a Union, Local 802 were substituted as a party, an area of factual identification would be established between the cause at bar and the *Lewis* case.

This analysis and vivisection, it is respectfully submitted, is a demonstration of a complete divergence of the *Lewis* case, from the facts in the cause under discussion.

CONCLUSION

THE AWARD AND DECISION APPEALED FROM, AS WELL AS FINDINGS NO. 1, 2, 5, 6 AND 7, AND THE RULING OF LAW DERIVING THEREFROM, SHOULD BE REVERSED AND SUCH FINDINGS OF FACT AS ARE CONSISTENT ONLY WITH THE RULE THAT THE RESPONDENTS RODGERS AND HAMMERSTEIN WERE THE TRUE EMPLOYERS OF THE APPELLANT-CLAIMANT, SUBSTITUTED THEREFOR, WITH COSTS AND DISBURSEMENTS IN ALL COURTS.

Respectfully submitted,

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