UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

Plano, Texas

PLANO SYMPHONY ORCHESTRA

Employer

and Case No. 16-RC-10844

DALLAS/FORT WORTH PROFESSIONAL MUSICIANS ASSOCIATION, LOCAL 72-147

Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

The Petitioner seeks to represent all musicians employed by the Employer and to exclude all other employees, including guards, clerical employees and supervisors as defined by the Act. Four issues were presented at hearing. The Employer challenges the appropriateness of the current discretionary standard established by the Board for asserting jurisdiction over orchestras. The Employer also contends that musicians are independent contractors as defined by the Act and therefore not statutory employees. The Employer also asserts that voter eligibility should be determined by a strict application of the formula outlined in *Davison-Paxon Co.,* 185 NLRB 21, 23-24 (1970) which would leave no eligible voters in the unit. Finally, the Union argues that the foreign student musicians should be excluded from the unit since they do not share a community of interest with the other musicians because their experience is educational, not economic.

II. THE REGIONAL DIRECTOR'S FINDINGS

I have considered the evidence adduced during the hearing and the arguments advanced by both parties. For the reasons set forth below, I find that the Employer is engaged in interstate commerce sufficient to warrant asserting jurisdiction. Further, I find that musicians employed by the Employer are not independent contractors and the proper formula for determining voter eligibility is set forth in *Juilliard School*, 208 NLRB 153 (1974). I also find that domestic and foreign students share a community of interest warranting their inclusion in the same unit. Applying the eligibility formula set forth below, approximately 112 employees are included in the unit sought by the Petitioner.

To lend a context to my discussion of the issues, I will first provide an overview of the Employer's operations. Then, I will discuss the evidence relevant to the issues at hand and the reasons that support my findings.

III. OVERVIEW OF EMPLOYER'S OPERATIONS AND SUPERVISORY STRUCTURE

The Employer is a professional symphony orchestra based in Plano, Texas. The orchestra plays an annual schedule that includes a subscription series of classical concerts and other single ticket events some associated with the holidays. The Employer also produces an educational program consisting of concerts for school groups. During the 2007-2008 season, the Employer presented 12 programs that included 17 concert performances. The Employer also performs irregular events, called "run-outs," where an entity contracts for a performance at community venues. Most run-outs involve a small number of musicians although during the past year six run-outs required a full orchestra. Overall, run-outs represent an insignificant portion of the Employer's overall business.

The Employer employs four full-time administrative employees including an executive director, data systems manager, a development person, and Music Director (a/k/a "Conductor") Hector Guzman. Part-time administrators include a bookkeeper/financial director, event coordinator and two box office workers. The Employer also employs Concert Production Manager Jim Gasewicz.[1]

Most of the Employer's regular concerts require a full orchestra averaging approximately 60 musicians. This complement is composed of a group of "core" and "substitute" musicians. The approximately 35 core musicians are identified by audition and every summer they are offered one-year contracts for the upcoming season. Once musicians become core members, they automatically offer subsequent annual contracts. Core musicians are required to perform five of the six classical series concerts and are offered all remaining "optional" concerts. Core musicians perform most regular events. Core musicians remain core until they choose not to renew their contracts and their positions are filled by audition.

Substitute musicians fill out the complement of musicians needed for each concert. The Employer maintains a list of substitute musicians ranking musicians from most to least desirable. The Employer ranks the list by its preference based on past experience and audition performance. In advance of each performance, the Music Director determines which instruments are needed and the Concert Production Manager calls substitute musicians to fill open positions. These musicians are offered individual contracts for each performance. Although they are referred to as substitutes, there is a group of about 20 musicians who consistently perform for the Employer.

Musicians are organized into sections based on the type of instrument they play. Within each section the Employer will name a principal musician to act as the lead for a given production. The parties stipulated that the principal musicians within each section are *not* supervisors within the meaning of the Act because they do not have the authority to engage in

[1] Gasewicz considers himself an independent contractor.

one or more of the Section 2(11) indicia.

IV. SUBSTANTIVE ISSUES

A. Whether the Employer is engaged in interstate commerce within the meaning of Act.

The Board established a discretionary standard for exercising jurisdiction over symphony orchestras. Section 103.2 of the Board's Rules and Regulations. The Board will assert jurisdiction where the orchestra has gross revenues in excess of $1 million, in addition to direct interstate commerce in the amount of $5,000. *American Federation of Musicians*, 333 NLRB 1108, 1108 (2001); *Newark Performing Arts Corp*., 323 NLRB 1297, 1297 (1997). See also *The Palm Beach Pops*, 343 NLRB 176, 177 (2004) (asserting jurisdiction with $1 million in gross revenue and $50,000 in interstate commerce). The Employer contends that this standard is outdated and the Board never intended to subject employers of its size to the jurisdiction of the Act. Nevertheless, the Employer and the Petitioner stipulate that the Employer meets the current commerce requirements for asserting jurisdiction over a symphony.[2] Accordingly, I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

B. Whether musicians are employees or independent contractors.

The Employer contends that the musicians are independent contractors based primarily on the factors set forth in the Restatement (Second) of Agency, Section 220 (1976). The Petitioner takes the position that the musicians herein are employees as defined in Section 2(3) of the Act. In examining whether the musicians are independent contractors, I will first provide a brief summary of the applicable law, then discuss the facts gleaned from the hearing regarding the working conditions for the musicians, and then discuss the applicable law in context of the facts.

1. <u>Applicable law regarding independent contractor status</u>

Section 2(3) of the Act expressly excludes "any individual having the status of an independent contractor" from the definition of "employee" and thus the protection of the Act. In assessing whether an individual is an employee or an independent contractor, the Board applies common law agency principles to the factual context. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968); *Young & Rubicam International, Inc*., 226 NLRB 1271, 1271-1272 (1976). The multi-factor analysis set forth in Restatement (Second) of Agency, Section 220 includes the following factors to be examined: (1) the length of time the individual is employed; (2) the method of payment, whether by time or by the job; (3) whether the employer or the individual supplies the instrumentalities, tools, and place of work; (4) whether the individual is engaged in a distinct occupation or business; (5) whether the employer is "in the business;" (6) the skill required in the particular occupation; (7) whether the employer retains the right to

[2] The Employer stipulated that during the year preceding the filing of this petition, a representative period, the employer in the conduct of its operations derived gross annual revenues in excess of $1,000,000. During the same period, the Employer purchased and received goods and services valued in excess of $5,000 which were furnished to the Employer's Plano, Texas facility directly from points outside the State of Texas.

control the manner and means by which the result is to be accomplished; (8) whether the parties believe they are creating an employment relationship; (9) whether the work is part of the employer's regular business; and (10) whether the individual bears entrepreneurial risk of loss and enjoys entrepreneurial opportunity for gain. See *BKN, Inc.,* 333 NLRB 143, 144 (2001); *Roadway Package System*, *Inc*., 326 NLRB 842, 850 (1998); *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 891 (1998). The Board has indicated that the Restatement factors are not exclusive or exhaustive, that no single factor is controlling, and that in applying the common-law agency test, it will consider "all the incidents of the individual's relationship to the employing entity." *Roadway Package System,* above; *BKN, Inc.,* above; *Slay Transportation Co., Inc*., 331 NLRB 1292, 1293 (2000). The party asserting that an individual is an independent contractor has the burden of establishing that status. *BKN, Inc.*, supra.

2. Facts regarding the musicians' working conditions with the Employer

In this section regarding facts, I will review: musician hiring practices; rehearsals and productions; musical direction; musician compensation; and instrumentalities and tools. The facts underlying these factors support a conclusion that the musicians herein are employees under the Act.

a) Musician Hiring Practices

The Employer establishes the music program and the Music Director determines the number and types of musicians required for each production. Core musicians are offered positions in all scheduled productions.

Every July, the Concert Manager mails work contracts and performance/rehearsal schedules to all core musicians. The contracts are for approximately one-year terms covering the upcoming season which starts in the fall. The contracts reference an enclosed schedule of all the concerts and rehearsals for the upcoming season. Rehearsals and performances are referred to as services and each production has a set number of services referred to as a service "block." For each classical concert block, the Employer has five services, consisting of four rehearsals and one performance. Services for other blocks vary.

The contract requires core musicians to perform a minimum of five of the six classical series blocks. Although the record contains no specific examples of employees being punished for not making the quota,[3] musicians believe it to be a required minimum. Two musicians testified that they developed conflicts that prevented them from meeting their obligations and they took a leave of absence (forfeiting their core positions). Although it is rare, other musicians requested and were granted special permission to opt out of a second required event.[4] In addition to the mandatory classical events, the remainder of the schedule is composed of the single ticket events that are optional events. These events are presented to the core members and they must write in their contracts which blocks they commit to work. The only way to guarantee receiving

[3] Gasewicz has worked for the Employer for four years. During that time, he is not aware of anyone having their contract cancelled for missing too many required events.

[4] Gasewicz testified that not too many opt out of a required concert, but if the musician presents an acceptable reason, the Employer will allow the musician to opt out of another event if given typically three weeks notice.

offers to play optional events is to maintain core status. Work contracts contain language stating that the musicians are independent contractors for the term of the contract.

Musicians are given approximately two weeks to sign and return their completed contracts noting their commitments.[5] If some core members do not return, the Employer advertises for auditions which are conducted by the Music Director/Conductor and Concert Manager and offers are made to fill these positions.[6]

The Employer maintains a substitute call list for filling out the complement of employees for each event not completed by core musicians. The order of musicians on the substitute list is established by the Concert Manager and Music Director based on prior experience with the musicians and/or their performance during auditions for open core positions. The list may only be changed at the permission of the Music Director. Among the substitutes is a group of about twenty musicians who regularly work for the Employer.[7] The Employer will send them contracts for individual events in advance of securing their commitments for several blocks at a time. These musicians have an expectation to play many scheduled events over a season and some have played with the Employer for many years. The Employer also employs a group of substitutes who perform less frequently and the Employer may send contracts to these musicians on relatively short notice. These musicians work occasionally, as little as one block (or run-out) and a few services a year. The work contracts for substitutes only differ from the core contracts by term. It contains language stating that the musicians are independent contractors for the term of their contracts.

Musicians are not required to play exclusively for the Employer and musicians work for many other employers. However, core musicians must meet their obligations to play five of the six classical events and consider their work for the Employer their main orchestral job. The core players work with other ensembles if it does not conflict with the Employer's schedule.

b) Rehearsals and Productions

A second factor supporting a conclusion that the musicians are employees concerns the control exerted by the Employer over musicians' terms and conditions of employment during rehearsals and productions. The Employer secures a local church for rehearsals. The subscription series of classical concerts requires approximately four rehearsals while other events require fewer rehearsals. Each rehearsal lasts approximately two-and-a-half hours, although the Music Director may hold musicians over for additional rehearsal at his discretion. Prior to rehearsals, the Employer identifies the sheet music required. Historically, musicians pick up the music at the Employer's office, although for a recent production the Employer provided the sheet music online. The sheet music, particularly scores, are considered expensive. The musicians must return the sheet music to the Employer's librarian within a specified time after the

[5] If contracts are not returned within the stated timeframe, the concert manager contacts the musician by telephone and confirms that the musician is no longer interested in remaining a core musician.

[6] Although the auditions were before a committee that included principal musicians, the parties stipulated that they did not have 2(11) authority and therefore lack the authority to effectively recommend that the Employer hire another musician.

[7] Some sections do not have core musicians and the principal musician in that section will regularly stay at the top of the substitute list.

conclusion of each production or incur significant charges. However, the harpist testified that she keeps her own copies of music instead of having the music provided to her because she has already marked her pedal cues.

Musicians must be prepared to play the selected music at the start of the first rehearsal. Contracts require that musicians learn the music in advance of the first rehearsal, arrive at the hall 15 minutes early and be in their seats five minutes before the start of rehearsals. The Employer will dock the musicians' pay for not arriving on time for rehearsals. Musicians who require extra time to set up their instruments (such as percussionists and the harpist) must arrive in advance of rehearsal and are paid a cartage fee to compensate them for their extra time in transporting and setting up their instruments.

After the rehearsals, there is normally one performance for the classical series. Each classical concert is about two to two-and-a half hours long. Single ticket productions, such as holiday and school concerts, may have multiple performances.

The contracts include a dress code. The code requires male musicians to wear black tuxedos and female musicians black dresses with the appropriate accessories. The dress code further specifies types of inappropriate work attire. Musicians provide their own concert dress consistent with the Employer's dress code.

The individual contracts state what is expected of musicians. The record is inconclusive as to whether the Employer has issued formal discipline to any employee or cancelled a contract. The work contracts state that the Employer retains control over the musician's professional conduct.

c) Musical Director

The record reflects that the Musical Director maintains significant control over the quality of the performances and direction of the musicians while they are in rehearsal and performances. Through the Music Director, Hector Guzman, the Employer has full artistic control of all performances and rehearsals, and all other phases of the musicians' musical effort, seating order, professional conduct and appearance.[8] He determines the number and types of musicians required for each production. The Music Director controls the rehearsals and performances including the content and he may vary from the printed music depending on his artistic interpretation. The Music Director gives overall direction as to how each piece should be played. He tells the musicians how he would like the music to sound (volume, pitch and blend), but he does not instruct them how to play their instruments or tell them which instrument to select for the pieces. He criticized musicians, such as those who are unprepared for rehearsal. The Music Director determines matters such as how much time to spend on each piece and whether to extend rehearsals beyond the scheduled time.

d) Musician Compensation

The record reflects that the Employer sets compensation and that no one has attempted to negotiate a different contract rate. The Employer determines the rate of pay for each service and

[8] This right is specifically stated in the *Management Rights* section of the work contracts.

pays the principal musicians a higher rate than sectional players. Rate of pay has no correlation to whether musicians are core members. The rate of pay is per "service," i.e., a rehearsal or performance. At the start of the 2007-2008 season, section players received $101 per service, and principal players were paid $122 per service. The Employer unilaterally increased these rates to $109 and $130 early in 2008.

The contracts also specify that musicians are to be paid overtime at a set rate for every fifteen minutes that the Music Director holds musicians over the planned 2 ½ hours for rehearsal. It is apparent that the Employer sets this rate at an amount equal to 15 percent of the per service rate for each individual employee. A 20 percent increase is also paid to musicians who are required to play more than one instrument (doubling) during a performance. The Employer pays musicians a cartage fee if they are required to appear early and set up a large instrument, such as a harp.[9] Pay rates are clearly stated in the work contracts and are not negotiated.

Musicians receive an IRS Form 1099 for miscellaneous income at the end of each calendar year. No musician receives an IRS Form W-2 from the Employer so no payroll taxes or other withholdings are deducted from the musicians' pay. They receive no vacation pay, holiday pay, health insurance, retirement or any other benefits.

e) Instrumentalities and Tools

The record reflects that both the Employer and the musicians provide tools for working. The Employer provides the venue for the rehearsals/performances as well as a chair and sheet music. Musicians normally provide and maintain their own instruments and provide insurance at their own expense.[10] While the Employer does not tell musicians to practice prior to the first rehearsal, the Employer expects the musicians to arrive at the first rehearsal prepared and most musicians regularly practice. As noted above, the musicians are required to have concert dress, which is specifically identified in their work contracts.

In most cases, the musicians provide their own instruments and have made substantial investments in those instruments. The testimony demonstrates that the musicians own several instruments and select the instrument depending upon the type of music that will be played at the concert and the desired sound to be achieved. They maintain and insure the instruments and, as needed, take appropriate tax deductions. These instruments, however, are utilized not only with the Employer, but at other venues as well. In some cases, the Employer pays for rental of certain instruments and will pay for cartage of the instruments.

3. Analysis

The Board has recognized the irregular employment patterns associated with the entertainment industry. *BKN, Inc*., 333 NLRB 143, 144 (2001); *DIC Entertainment*, 295 NLRB 989 (1989); *Juilliard School*, supra; *American Zoetrope Productions,* 207 NLRB 621 (1973); *Medion, Inc.,* 200 NLRB 1013 (1972). Irregular patterns of employment associated with some industries explain the absence of some of the usual indicia of employee status and highlight the

[9] The record reflects that this fee is a vestige of a collective-bargaining agreement between the parties that expired in 1999.

[10] The Employer may rent large instruments.

importance of others such as the control exercised over the employee and the lack of entrepreneurial enterprise. *BKN*, 333 NLRB at 145. The Board has recognized that an industry's irregular patterns of employment "must be taken into account when determining" independent contractor status under the Act. Id.

In *BKN, Inc*., supra, the Board found freelance television scriptwriters to be employees within the meaning of the Act. Factors suggesting independent contractor status included the fact that the scriptwriters had the freedom to work out of their homes; set their own hours; provided their own equipment; were not subject to discipline; signed individual work contracts; could work for other employers; received no benefits; and had no taxes or other deductions withheld. Nevertheless, the Board found an employer-employee relationship existed because the Employer exercised significant control over the creative process, the writers performed functions that were an essential part of the Employer's operations, and the writers were an integral part of the Employer's business under the Employer's substantial control. Despite having much autonomy in performing their work, the writers did not act as true entrepreneurs. Compare *DIC Animation City,* 295 NLRB 989 (1989) (writers engaged in an entrepreneurial enterprise and had significant control over their own terms and conditions of employment).[11]

This level of control over terms and conditions of employment and the entrepreneurial risk accompanying such control, were factors relied upon by the Board in finding independent contractor status in *Pennsylvania Academy of Fine Arts*, 343 NLRB 846 (2004). Art school models in that case had complete control over their schedules, could decide how many classes to accept, what hours to work, and which specific classes to accept, and they could choose their schedule according to which professors and types of classes they preferred, which class times were convenient, or on any other basis they wished. The hours worked and schedules among the models varied widely and they had no ongoing relationship with the art school. Significantly, the Board concluded the models were in the business of modeling, while the employer was in the business of running an art school.

In the instant case, the most significant factors supporting a finding that the musicians are not independent contractors include the extent of control over the details of the work, whether the principal is in the business, and the entrepreneurial risk. Regarding control, core musicians do not have total control over whether, when, and how much to work for the Employer. Although none of the musicians work exclusively for the Employer, core musicians are limited in the work they may perform in other ensembles. The requirement that they perform a specific number of blocks during the concert season limits their freedom to pursue regular core positions in other ensembles. Moreover, only core musicians are guaranteed any offers for optional blocks of employment and therefore must maintain their core status to guarantee these offers. Further, once hired as a core musician, the musicians remain core for an indefinite period of time. Therefore, core musicians regularly play most productions and many have long ongoing relationships with the Employer (as do some substitutes). Additionally, the Employer controls

[11] The freelance writers in *DIC Animation City*, supra, formed their own companies for contracting with the employer while others formed writing teams that subdivided script writing work at their discretion. The writers also negotiated employment terms with the Employer. Significantly, the writers bore risks and enjoy the gain associated with entrepreneurial enterprise. Despite a substantial investment of resources, the writer ran the risk that their ideas could be rejected and they would be unpaid.

where, when, and how long each of its musicians will rehearse, timeliness and appearance. The Employer keeps its core players from year to year, controls who is offered substitute positions, and decides which musicians will serve as its principal players. These factors are strongly indicative of employer control over the manner and means of performance of the work. See *BKN, Inc*., supra; *American Federation of Musicians (Royal Palm Dinner Theater)*, 275 NLRB 677, 681-682 (1985).

The Employer also is in the business of presenting musical selections, as are the musicians while they perform for the Employer. This situation is distinctly different from *Pennsylvania Academy*, in which the Board found that the models were in the business of modeling as opposed to the employer engaging in the business of operating an art school.

Regarding the entrepreneurial risk, musicians are not engaged in a true entrepreneurial enterprise. Entrepreneurial risk is evidenced where earnings are dictated by self-determined policies, personal investment and expenditures, securing business, and market conditions. *The News-Journal Co.*, 227 NLRB 568, 570 (1976). Musicians are required to perform a certain number of performance blocks in the classical series and then optional blocks. This does not equate to complete control but does limit the musicians from maintaining core relationships with other ensembles. The Employer unilaterally sets the schedule for rehearsal and performances and establishes wage rates. The Employer provides the venue for rehearsals and performances, the music to be played, and large instruments. Musicians may vary their earnings by outside employment and by choosing to play in the optional program. However, the only way to guarantee offers in the optional program is to be a core member which requires the musicians to play a specific number of classical concerts. Musicians bear the minority of the risks, including costs of instruments and clothing for the performances, and enjoy little opportunity for gain normally associated with an entrepreneurial enterprise, such as a percentage of revenue from the performances.

Factors tending to support a finding that the musicians are independent contractors include the fact that most musicians supply their own instruments and all of them are highly-skilled individuals selected based on their talent and experience. The musicians may choose not to play optional performances. Additionally, musicians receive 1099 forms and no benefits. Regarding whether the parties believe a master-servant relationship exists, the musicians' contracts state that the musicians are independent contractors, but the testimony is controverted as to whether each musician believes he is an independent contractor.

Notwithstanding the limited factors favoring a finding that the musicians in the petitioned-for unit are independent contractors, the factors favoring an employee-employer relationship outweigh the evidence favoring a finding that the musicians are independent contractors. The major factors demonstrating employee status include the continuity of employment of the core musicians and some of the substitute musicians, the fact that the musicians' performances constitute the Employer's regular business, the Employer's retention of the right to control the manner and means by which the performance of music is to be accomplished; the unilateral setting of wage rates by the Employer; the unilateral payment of premiums when rehearsals are extended; docking pay when musicians are late to rehearsals; and,

most importantly, the musicians' general lack of entrepreneurial risk of loss or gain.[12] I, therefore, find that the Employer has not carried its burden of demonstrating that the musicians are independent contractors and, therefore, are employees within the meaning of Section 2(3) of the Act.

C. Whether the *Davison-Paxon* or an alternative eligibility formula is appropriate.

In examining what formula to apply to the bargaining unit, I will examine *Davison-Paxon*, supra, and other alternative formulas. Included in this discussion is presentation and evaluation of the respective parties' positions.

The Board applies formulas to determine whether irregular employees have a sufficient community of interest with regular employees warranting their inclusion in a voting unit. In devising eligibility formulas to fit the unique conditions of any particular industry, the Board seeks "to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer." *Trump Taj Mahal Casino*, 306 NLRB 294, 296 (1992), enfd. 2 F.3d 35 (3d Cir. 1993); *Steppenwolf Theatre Company*, 342 NLRB 69 (2004); *DIC Entertainment, L.P.,* 328 NLRB 660 (1999), enfd. 238 F.3d 434 (D.C. Cir. 2001). The Board's longstanding and most widely used formula for voting eligibility for part-time or on-call employees is the *Davison-Paxon* formula, under which an employee is deemed to have "a sufficient regularity of employment to demonstrate a community of interest with unit employees if the employee regularly averages 4 or more hours of work per week for the last quarter prior to the eligibility date." *Davison-Paxon Co.,* 185 NLRB 21, 23-24 (1970). Where special circumstances exist the Board applies alternative formulas to optimize enfranchisement.

In the current case the Employer maintains that the *Davison-Paxon* formula should be applied which would result in no eligible voters in the unit. Effectively, the Employer is contending that no unit is appropriate since all musicians are casuals. The Union, on the other hand, maintains the *Juilliard* formula should apply because it gives those employees with a reasonable expectancy of future employment the right to vote. The Union also contends that *Davison-Paxon* was not intended to eliminate all employees from a unit, rather it was intended to establish a community of interest standard between a unit of regular employees and irregular employees. If the *Juilliard* standard is found to be appropriate, the Employer argues that it should apply over a three-year period. The Employer offers no rationale for extending the *Juilliard* standard to three years.

It is well established that the *Davison-Paxon* formula is normally applied to determine eligibility of part-time or on-call employees, absent a showing of special circumstances. *Steppenwolf Theatre Company*, 342 NLRB 69 (2004); *Wadsworth Theatre Management*, 349 NLRB No. 22 (2007); *Columbus Symphony Orchestra*, 350 NLRB No. 49 (2007). Special circumstances include irregular employment patterns. Irregular patterns of employment in the entertainment industry have sometimes presented special circumstances leading the Board to apply alternative eligibility formulas suited to unique conditions.[13] For example, an alternative

[12] The Employer unilaterally determines the terms and conditions of employment for all its musicians.

[13] See, e.g., *DIC Entertainment,* supra (employees eligible where they worked two productions for a total of 5 days over 1 year, or at least 15 days over a 1 year period); *Juilliard School*, supra (employees eligible where they worked

formula was used in *Juilliard School* because the employer in that case produced relatively few performances using almost exclusively per diem employees. The resulting employment pattern required an alternative formula to optimize enfranchisement. Considering the number and length of productions, as well as the overall employment patterns, the Board decided that employees employed on two productions for a total of five working days over a one-year period or 15 days over a two-year period had this community of interest warranting their inclusion. *Juilliard School,* 208 NLRB at 155.

The Board recently clarified what circumstances warrant deviating from *Davison-Paxon* in favor of the *Juilliard* formula. *Steppenwolf Theatre Company*, 342 NLRB 69 (2004), citing *Juilliard School*, 208 NLRB 153 (1974). The Employer in *Steppenwolf* operated a regional theater company. The petitioner sought a unit of production employees. The Regional Director applied the *Juilliard* formula since the employer produced theatrical productions using a group of core permanent production employees who were supplemented by per diem part-time employees on an as needed basis. The Board found that the Regional Director failed to consider:

- Size and the regularity of operations;
- Whether a majority of the work is performed by a full-time staff; and,
- Whether there is a sizable part-time staff working a large number of hours.

Considering these factors, the Board found that this employer had a regular and constant schedule (producing some 500 performances annually) with a substantial majority of workers being permanent, full-time staff supplemented by on-call workers. Therefore, the Board found no special circumstances warranting an alternative to *Davison-Paxon*. This rational was applied in subsequent cases. See *Wadsworth Theatre Management*, 349 NLRB No. 22 (2007) (no special circumstances where the employer put on at least four productions lasting four weeks each in addition to a regular weekly and other special events); and *Columbus Symphony Orchestra*, 350 NLRB No. 49 (2007) (the employer performed a year-round 46-week schedule including more than 170 performances, with the vast majority of production work being performed by full-time staff, and having sizable complement of on-call employees working on an as needed basis.).

In the instant case, a group of core musicians reasonably anticipate reemployment every season. The Employer hires a core of employees who played most all performances, substitutes who consistently played performances, and substitutes who played few performances. The evidence shows most employees in the first two groups (with exception to some student musicians discussed below) have worked for periods of time which reflect continued periods of employment, permitting them to reasonably anticipate reemployment in the near or foreseeable future. *Juilliard School*, 208 NLRB 153 (1974). In fact, core players are automatically offered new contracts annually without audition. The Employer hires a group of about twenty substitutes on a consistent basis. This regular pattern of employment is indicative of the type of expectation of future employment necessary to establish a continuing interest in terms and conditions of

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two productions for a total of 5 days over 1 year, or at least 15 days over a 2 year period); *American Zoetrope Productions,* 207 NLRB 621 (1973) (employees eligible where they worked two productions during the past year); *Medion, Inc.,* 200 NLRB 1013 (1972) (employees eligible where they worked two productions for 5 days over 1 year).

employment. *C. W. Post Center of Long Island University,* 198 NLRB 453 (1972). These musicians reasonably expect their current working relationship with the Employer to continue for an uncertain time period. *Personal Products Corp.*, 114 NLRB 959, 960 (1955); and *MJM Studios of New York, Inc.*, 336 NLRB 1255, 1257 (2001). Because a group of musicians have repetitive employment that permits them to reasonably anticipate reemployment in the near or foreseeable future, that group constitutes an appropriate unit for collective bargaining.

To determine which employees share a substantial community of interest in the unit, an eligibility formula is required. The Employer produces relatively few performances over the course of a season and had only 12 programs that included 17 concert performances during this past season. The Employer had some run-out performance but those were rather insignificant in comparison to its regular schedule. The employer has no full-time musicians.[14] The Employer relies exclusively on part-time employees consisting of core musicians who play most events and a regular group of substitutes who play many events. In fact, application of the *Davison-Paxon* formula, advocated by the Employer, would find no employees eligible to vote. This was the same argument made by the employer and rejected by the Board in *Juilliard School*. Such a result is at odds with the express purpose of applying this eligibility formula, i.e., permitting optimum employee enfranchisement by identifying a community of interest between two groups of employees. These facts present special circumstances warranting a deviation from *Davison-Paxon*.

I find that an alternative formula is necessary in consideration of the special circumstances presented by the frequency of the Employer's stage productions and the resulting employment pattern. The Employer relies exclusively on part-time employees to fill its orchestra because it has relatively few productions consisting of few performances. See *Wadsworth Theatre Management*, 349 NLRB No. 22 (2007), citing *Juilliard*, 208 NLRB at 154. Accordingly, I find that employees employed on two productions (blocks) for a total of five working days (services) over a one-year period, or 15 days (services) over a two-year period has a community of interest warranting their inclusion in the voting unit. These employees share common schedules, wages, duties, supervision, and overall working conditions and therefore share a community of interest.

D. Whether foreign student musicians share a sufficient community of interest with the other musicians

The Employer utilizes student musicians from local educational institutions, predominantly Southern Methodist University and University of North Texas. The educational programs require that the music students obtain some professional experience and provides academic credit for these experiences.[15] Approximately 50 percent of the student musicians in the current case are foreign students who have entered the United States of America on student visas, not work visas.[16] The Union contends that the foreign students do not share a sufficient community of interest with the proposed bargaining unit because their visa restrictions limit the

[14] The only full-time employees are three administrative employees.
[15] In the alternative, the Southern Methodist University program allows the students to teach private music students for academic credit.
[16] The record was unclear as to the precise number of foreign students involved in the current case.

manner in which they work and the periods they may be employed. The Employer contends that the foreign students should be included if the musicians are not independent contractors.

By law the foreign students may only obtain work that is integral to their course of study. Educational institutions conduct *curricular practical training programs* (CPTs) allowing foreign students to meet the legal requirements for employment. Generally, the CPT programs require foreign students to obtain permission from their educational institution to perform work. The educational institutions certify that the work relates to the student's course of study and notifies the government so student visas are appropriately modified. The student usually receives educational credit and experience for participating in employment with the Employer. Foreign students are disqualified from participating in CPT programs after completing their educational programs. The unique nature of this working relationship raises a question of whether they have a substantial community of interest with the other musicians such as would warrant their inclusion in the unit.

The Union contends that the issue of employee status of the foreign students in this case is controlled by *Brown University*, 342 NLRB 483 (2004). In *Brown University*, the Board found that graduate student assistants enrolled at Brown were not employees within the meaning of Section 2(3) of the Act. In that case, the facts demonstrated that Brown was a private university that conferred undergraduate and graduate degrees. The petitioned-for graduate student assistants--teaching assistants, research assistants, and proctors--received awards from Brown's academic departments, and Brown paid the graduate student assistants' stipends from the awards and also paid their university tuition from other resources. Because the graduate student assistants were "first and foremost" students and the "evidence demonstrate[d] that the relationship between Brown's graduate student assistants and Brown [was] primarily educational," the Board found that the graduate student assistants were not employees within the meaning of Section 2(3) of the Act. *Id*. The Board emphasized the graduate assistants were "serving primarily as students and not primarily as employees … [and] the mutual interests of the students and the educational institution in the services being rendered are predominately academic rather than economic in nature." *Brown*, 342 NLRB at 487, citing *St. Clare's Hospital*, 229 NLRB 1000, 1002 (1977). The fundamental premise of the Act is to cover economic relationships and not those that are primarily educational. *Brown*, 342 NLRB at 488.

More recently, in *The Research Foundation of The State University Of New York Office Of Sponsored Programs*, 350 NLRB No. 18 (2007), the Board considered the application of *Brown* to an independent non-profit corporation. The employer was chartered to maintain and develop gifts, grants, contributions and donations that assisted the State University of New York (SUNY). The graduate assistants used the program to obtain research experience required by their degree program and their supervisors frequently served on their dissertation committees. After the research assistants completed their degrees, their relationship with the employer ended. Applying the rationale of *Brown*, the Board found the research assistants to be employees. The Board noted that the employer was not an educational institution, did not confer degrees, and did not remit funds to SUNY. Moreover, the research assistants were employed solely by the employer and treated as the other employees receiving compensation, benefits, and other awards administered by the employer. The Board found these facts indicative of an economic relationship and not one that was primarily educational. *Id.*, slip op. at 4.

The instant case is similar to *Research Foundation*. The current Employer is not an educational institution, rather an employer in the business of operating a symphony orchestra. It receives no special economic benefit from the schools from which its student musicians are derived. Although foreign student musicians receive credit hours from the CPT programs and their relationship with the employer ends when they graduate, the Employer is interested in producing the best possible product to sustain its business. All musicians are treated the same regardless of whether they are a foreign student, domestic student, or non-student. Therefore, I find that the relationship is primarily economic, not educational and these students are employees within the meaning of Section 2(3) of the Act.

Although the foreign students have a primarily economic relationship with the Employer, there are factors of their relationship that are fundamentally different than other employees. They are limited in what work they may obtain and must have permission from their educational institutions. Moreover, these students would not be able to work for the Employer after they complete their degrees. It is undisputed that foreign students who work for the Employer are legal workers who enjoy the exact same terms and conditions of employment as other musicians. Although their employment does not exceed the term of their college curriculum, that factor was also present in *Research Foundation* where student workers were found to be employees. Moreover, while some foreign student musicians may have a short expectation of future employment, there is evidence that some are core musicians hired for more than one season. Therefore, I find no reason to exclude them from the bargaining unit simply on the basis that they are foreign students.

The record further reflects that the foreign students have the supervision, the same employee skills and functions, and the same working conditions as the other musicians. I, therefore, find that the foreign students also share a community of interest with the other musicians. The voter eligibility formula applied herein will accurately identify those foreign students who share a community of interest with other musicians in the petitioned-for unit.

V. SUMMARY

In view of the pertinent Board law and the evidence reflected in the record, I find that, the Employer is engaged in commerce as defined in the Act and the Board's Rules and Regulations and therefore is subject to the Board's jurisdiction. I further find that the musicians are employees and that the appropriate formula to determine inclusion in the petitioned-for unit is dictated by *Juilliard School*, supra. In addition, I find that the foreign students have an economic, rather than academic, interest in their relationship with the Employer and therefore are properly included in the petitioned-for unit.

VI. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The parties stipulate, and I find, that the Employer is a Texas corporation, with its principal place of business in Plano, Texas where it is engaged in the business of performing orchestral and chamber music. During the year preceding the filing of the petition in this case, a representative period, the Employer, in the course and conduct of its business operations, derived gross revenues in excess of $1,000,000. During the same representative period, the Employer purchased goods valued in excess of $5,000 which were furnished to the Employer's Plano facility from points outside the State of Texas.

3. I find that the Petitioner claims to represent certain employees of the Employer.

4. Based on the record of evidence, I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All musicians, including student musicians, employed by the Employer on two productions (blocks) for a total of five working days (services) over a one-year period, or 15 days (services) over a two-year period.

EXCLUDED: All other employees, including clerical employees, guards and supervisors as defined by the Act.

VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Dallas/Fort Professional Musicians Association, Local 72-147. In a seasonal operation such as this one, the Board prefers to hold elections when a high percentage of the voting unit is working, to ensure adequate turnout. *Industrial Forestry Association*, 222 NLRB 295 (1976); *Bogus Basin Recreational Association,* 212 NLRB 833 (1974). Therefore, I am directing that an election take place during the 2008-2009 season with the precise date to be determined by the Regional Director after consultation with the parties.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed on two productions for a total of five working days over a one-year period, or 15 days over a two-year period immediately before the date of this Decision.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic

strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. ***Excelsior Underwear, Inc.***, 156 NLRB 1236 (1966); ***NLRB v. Wyman-Gordon Company***, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Fort Worth Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. ***North Macon Health Care Facility***, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Fort Worth Regional Office, on or before June 6, 2008. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at 817-978-2928. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Fort Worth Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. ***Club Demonstration Services***, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EDT, on June 13, 2008. You may also file the request for review electronically.

The National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with this Supplemental Decision and Order for guidance in doing so. Further guidance for E-filing may be found under E-Gov on the National Labor Relations Board website at http://www.nlrb.gov. On the home page of the website, select the E-Gov tab and click on E-filing. Then select the NLRB office for which you wish to E-file your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

Dated May 30, 2008, at Fort Worth, Texas.

/s/ Martha Kinard

Martha Kinard, Regional Director
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