UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

In the Matter of PLANO SYMPHONY ORCHESTRA ASSOCIATION, Respondent, and DALLAS/FORT WORTH PROFESSIONAL MUSICIANS ASSOCIATION, LOCAL 72-147 OF THE AMERICAN FEDERATION OF MUSICIANS, Petitioner	§ § § § § § § § § § § § § §	Case No. 16 RC 10844

STATEMENT IN OPPOSITION TO PLANO SYMPHONY ORCHESTRA'S REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION

Pursuant to the Board's Rules and Regulations, the Dallas/Fort Worth Professional Musicians Association, Local 72-147 of the American Federation of Musicians, (hereinafter referred to as "the Union"), hereby files its Statement in Opposition to Plano Symphony Orchestra's Request for Review of Decision and Direction of Election, and in support thereof, would show as follows:

In its request for review, the Plano Symphony Orchestra (hereinafter referred to as "the PSO") seeks to overturn the Decision and Direction of Election issued May 30, 2008. The PSO urges request for review of this case on two bases. First, the PSO is seeking reconsideration of the

NLRB Rules and Regulation § 103.2 providing the circumstances upon which the NLRB will assert jurisdiction. Secondly, the PSO asserts that the Regional Director's Decision erred in holding that the musicians who perform with the PSO are employees rather than independent contractors, contending that by doing so, she departed from Board precedent and allegedly relied on factually extraneous interpretations of the record.

Neither of these bases are appropriate nor supported by the record in this case. With respect to reconsideration of § 103.2 of the Board's Rules and Regulations, inasmuch as the Board exercised its authority to engage in rule making in setting the rule, and has indicated no interest in changing the rule, to date, as the Regional Director pointed out in her decision, the employer did stipulate that its operations in the year preceding the filing of this petition, a representative period, that in the course of its operations, that it derived gross annual revenues in excess of one million. During the same period, the employer purchased and received services valued in excess of $5,000.00 which were furnished to the employer's Plano, Texas facility directly from points outside of the state of Texas. Accordingly, there is no question that this employer is within the discretionary standard established by the Board for exercising jurisdiction over symphony orchestras.

Secondly, with respect to whether the musicians are employees or independent contractors, for the reasons set forth in the Regional Director's Decision and Direction of Election dated May 30, 2008, the Regional Director's finding that these musicians are employees and not independent contractors is well supported by the record and is consistent with existing case law.

Further, the PSO's reliance upon the Regional Director in Region 4's Decision in *Lancaster Symphony Orchestra* (4-RC-21311) is misplaced. In that case, the Union therein did request and the Board has granted a request for review and the case is currently pending before the Board. Of course

in that case, where the request for review was granted, the Union was challenging the Regional Director's determination that the musicians were independent contractors, rather than employees. That very same Regional Director in Region 4, had also issued a Decision and Direction of Election in *Concerto Soloist d/b/a The Chamber Orchestra of Philadelphia*, Case 4-RC-21019 (2005) wherein she found employee rather than independent contractor status based upon almost identical facts to the case at bar. It appears that in that case a request for review was filed, but not granted by the Board. However, the PSO in its request for review in the instant case does not mention that case. The *Philadelphia* case, taken with the fact that the Board did not grant the request for review filed in that case, indicates a consistency as opposed to a dispute between the findings in Region 4 and Region 16 with respect to this issue.

In any case, the Regional Director's decision is well supported by Board precedent. For these reasons and the reasons articulated in the Regional Director's Decision and Direction of Election, the Union would respectfully request that the Board not grant a request for review in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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