Lancaster Symphony Orchestra *and* The Greater Lancaster Federation of Musicians, Local 294, AFM, AFL-CIO, Petitioner. Case 4–RC–21311

December 27, 2011

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

On July 27, 2007, the Regional Director issued a Decision and Order in which she found that symphony orchestra musicians in the petitioned-for bargaining unit were independent contractors, not statutory employees. Accordingly, she dismissed the representation petition at issue. Thereafter, pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Petitioner filed a request for review of that decision.

On October 31, 2007, the Board granted the Petitioner's request for review. The Petitioner and the Employer filed briefs on review.

Having carefully reviewed the entire record, including the parties' briefs on review, we find, contrary to the Regional Director and our dissenting colleague, that the musicians are employees under Section 2(3) of the Act. Accordingly, we reinstate the petition and remand this case to the Regional Director for further appropriate action.

Facts

The Lancaster Symphony Orchestra (the LSO) provides live musical performances and educational outreach programs in Lancaster, Pennsylvania. The LSO is overseen by a board of directors consisting of 30 community volunteers. It employs seven full-time employees, none of whom are orchestra musicians. Full-time employees receive a salary, health insurance benefits, a paid vacation, and holiday and sick pay. The LSO's president and CEO, Scott Robinson, its coordinator/artistic director, Tom Blanchard, and the music director/conductor, Stephen Gunzenhauser, are full-time employees. The LSO also employs three part-time employees who work 15 to 20 hours per week and are paid an hourly rate, but do not receive any fringe benefits.

The LSO performs a regular series of six classical concerts, each performed four times, and various other one-time events, including holiday and summer concerts. Generally, each separate program of music is preceded by four rehearsals.

Music for each season is chosen by Gunzenhauser, the Orchestra's music director. He decides on a theme, and then requests input from the board of directors. Collectively then, the "concept" for the season evolves with the music director making the final decisions.

Each season, the LSO mails information packets to approximately 120 musicians, seeking to determine their availability for the upcoming season. The packet is sent to those musicians who have performed with the LSO on a regular basis and those who have most recently performed with the LSO. Approximately half of those musicians who receive a packet respond. Some of the musicians return to play for the LSO year after year. Three or four musicians have played for the LSO for over 30 years, including one musician who has played for the LSO since its inception 59 years ago.

When returning their packets, the musicians may request that they be permitted to perform in specified programs or concerts. Enclosed in the information packet is a Musician Agreement Form, which the musicians must sign in order to participate in any of the programs. Among other things, the agreement is for a 1-year term, and indicates that the musician's status is that of an independent contractor. The contract also specifies that the musicians will be paid a "fixed fee on a per-service basis." The terms of this agreement are not negotiated. The music director/conductor chooses which musicians will perform in each program or concert, from among those who have expressed interest.

For the 2006–2007 season, the LSO's principal players received $75 a "service" (rehearsal or concert), and the section players received $60 a service. The principal players are the "leaders" of a particular section, and the section players are members of a particular section, e.g., the violin section. Each service is divided into 15-minute increments. After 2-1/2 hours, the LSO principals receive $12 for each additional 15-minute segment and the section players receive $9.45.[1] Payroll taxes are not deducted from the musicians' paychecks, and they are not required to fill out W-2 forms. Additionally, the musicians do not receive any health benefits, vacation time, or retirement/pension.

The musicians are highly skilled in their art, and are expected to be fully prepared and versed in the music when they arrive at the first rehearsal. They receive the music in advance of this rehearsal. The musicians are not compensated for their personal practice time.

[1] Musicians living outside of the immediate Lancaster area are paid a travel stipend, which ranges from $20 to $40 a day, plus Thursday meal allowances. The maximum amount of money that section players earn through live performances, excluding education outreach, is, typically, approximately $3000 for one season.

The music director/conductor sets the number of rehearsals. All musicians performing in the program are required to attend all rehearsals. The musicians must appear and "be in their chairs, ready to go," at the rehearsal's starting time. (Tr. 89.) Musicians "must attend all 4 rehearsals of the Regular Series" but may be excused from one of the first three "with the approval of the personnel manager and conductor." A musician who misses the final, Thursday evening rehearsal "will not be allowed to play the performances, except with the permission of the conductor." (P. Exh. 1; E. Exh. 1.)

At rehearsal, the musicians meet as an ensemble to "refine" the program. The conductor determines how long each rehearsal lasts. Musicians are required to remain at the rehearsal until it ends. The conductor also determines when breaks will be called during rehearsals. The conductor directs the musicians in putting the program in its final form for performance. The conductor determines how and when certain sections "come in" during a performance, how loud certain instruments should be, and whether the sound of certain instruments should be adjusted.

The LSO maintains rehearsal and performance guidelines for musicians. The rehearsal guidelines provide, inter alia, that musicians must not talk or practice when the conductor is on the podium and must "[m]aintain good playing posture and [] not cross legs while playing." (P. Exh. 4.) The performance guidelines stipulate, among other things, that musicians must maintain an attentive appearance throughout the performance and they must not "cross legs, even during tacets."[2] They must not "react to mistakes" and must turn pages, etc. "[a]s quietly as possible." They are not allowed to talk during a performance or during bows. (P. Exh. 4.) The musicians are expected to adhere to a dress code for the concerts, which specifies that men and women must wear black clothing. Specifically, the men must wear black tuxedos with coat tails and white tie, and the women are expected to wear black formal attire, either a dress or slacks.

The musicians are expected to provide their own instruments, strings, and dress attire. The LSO provides the concert hall, chairs, stands, and music. The LSO will also rent a piano from a piano distributor, and the timpani and certain other percussion pieces, for the musicians who play these instruments.

For musicians who sign up for a program and then later determine that they cannot fulfill their obligation to perform, the LSO requests that they provide at least 4–6 weeks prior notice. When such notice is given, the LSO attempts to find substitutes. If a musician cancels at the last minute, the LSO requests that the musician help find a replacement with the same skill level. There are no repercussions, however, if the musician is unable to find a replacement.

Musicians are permitted to perform for other musical entities, during both the on- and off-season. The LSO's president testified that "to make it work for themselves," the musicians must play with a number of orchestras and musical ensembles, and teach. For example, musician Ricky Staherski has played for the LSO for 32 years, and he also plays for other orchestras in the area on a regular basis.

The LSO has the authority to discipline musicians, and has in fact done so at least once. LSO President Scott Robinson reprimanded musician Christina Harris in a letter for behavior during a rehearsal that was "inconsistent with the professional working environment" the LSO strives to provide. (P .Exh. 3.) The letter also threatened "further actions such as suspension for an appropriate period of time" if the behavior recurred.[3] Beyond this written reprimand, there is no evidence that the LSO has exercised its authority to discipline musicians. As set forth above, however, musicians who miss the Thursday evening rehearsals are not permitted to play in the performances without permission of the conductor.

Regional Director's Decision

The Regional Director, relying primarily on *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846 (2004), found that the musicians are independent contractors. She concluded that the musicians retain extensive control over their own schedules. They decide which programs to accept and thereby what days and hours to work. This "control," according to the Regional Director, affects the musicians' ability to determine their own wages and earnings.

The Regional Director also found that additional factors supported a finding of independent contractor status: (1) the musicians sign Musician Agreement Forms acknowledging their status as independent contractors for a 1-year term; (2) the musicians' rate of pay is "per service," i.e., performance or rehearsal; (3) the musicians are highly skilled at their occupation; (4) the musicians provide their own instruments and concert clothes for the

[2] A "tacet" is "used as a direction in music to indicate that a particular instrument is not to play during a movement or long section." *Webster's New Collegiate Dictionary 1177* (1979).

[3] P. Exh. 3. According to the letter, Harris left her position onstage during a rehearsal. Upon returning to the stage, Harris stood directly behind the principal bass stand to observe the soloists. She then asked the principal about something that had been covered in previous rehearsals, at which time the principal "requested" that she return to her stand.

concerts; and (5) the musicians are not required to play exclusively for the LSO.

The Regional Director acknowledged that there were factors that favored employee status, such as the LSO's control over the manner and means of performance and that the musicians' performances constituted the LSO's regular business. However, she found that these factors were outweighed by those supporting independent contractor status.

Analysis

The party seeking to exclude individuals performing services for another from the protections of the Act on the grounds that they are independent contractors has the burden of proving that status. *BKN, Inc.*, 333 NLRB 143, 144 (2001). In determining whether individuals are independent contractors or statutory employees, the Board applies the common-law agency test, which ultimately depends upon an assessment of "all of the incidents of the relationship . . . with no one factor being decisive." *NLRB v. United Insurance Co.*, 390 U.S. 254, 258 (1968), enfg. 154 NLRB 38 (1965); *Roadway Package System, Inc.*, 326 NLRB 842, 843, 850 (1998). The relevant factors include (1) whether the putative employer has the right to control the manner and means of performance of the job; (2) whether the individual is engaged in a distinct occupation or business; (3) whether the individual bears entrepreneurial risk of loss and enjoys entrepreneurial opportunity for gain; (4) whether the employer or the individual supplies the instrumentalities, tools, and place of work; (5) the skill required in the particular occupation; (6) whether the parties believe they are creating an employment relationship; (7) whether the work is part of the employer's regular business; (8) whether the employer is "in the business"; (9) the method of payment, whether by time or by the job; and (10) the length of time the individual is employed. See, e.g., *BKN, Inc.*, 333 NLRB at 144; *Roadway Package System*, 326 NLRB at 849–850 fn. 32. This list of factors is not exhaustive, and the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors in another case. *Arizona Republic*, 349 NLRB 1040 (2007); *Roadway Package System*, 326 NLRB at 850. Moreover, the ultimate inquiry "requires more than simply tallying factors on each side and selecting the winner on the basis of a point score." *Schwieger v. Farm Bureau Insurance Co. of NE,* 207 F.3d 480, 487 (8th Cir. 2000) (making determination based on combined weight of all the factors "when considered together in light of common-law agency principles"). Having carefully examined all the factors, we conclude for the reasons explained below that the Employer has failed to establish that the musicians are independent contractors.

Turning first to the question of control over the manner and means by which the result is accomplished, we find that this factor tips heavily in favor of employee status. Here, the musicians may choose which programs they would like to participate in, but it is the LSO that retains the right to control the music to be played in each program, which musicians are selected for it, how the musicians prepare, and how the music is performed. The music director determines the repertoire for each season. The music director sets the number of rehearsals for each program, runs the rehearsals, including determining when breaks may be taken, and determines when each rehearsal will end. At the rehearsals, the music director controls what the musicians practice, determines how much time to spend on each piece, and decides whether to have the entire Orchestra or only certain instruments rehearse a portion of the music.

The LSO further asserts control over the musicians by maintaining a list of guidelines for behavior during rehearsals, prior to the concert, during the concert, and at the end of the concert. This list of guidelines includes "maintain[ing] good posture and playing positions" and "no talking during bows." The LSO also maintains guidelines as to concert dress. See, e.g., *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1101 (9th Cir. 2008) ("Friendly's extensive, mandatory dress code for all of its taxicab drivers also constitutes additional evidence of control.").

The discipline imposed and threatened by the LSO further evinces control. The LSO has issued a written reprimand by letter to a musician for unprofessional behavior during a rehearsal and threatened further discipline. The letter stated that "we expect that this behavior will be corrected in the future and will not recur. Should it happen again, further actions such as suspension for an appropriate period of time could be recommended." The LSO controls the musicians' attendance at rehearsals by providing that they may not play at performances if they miss a Thursday evening rehearsal without the conductor's permission.

To be sure, the LSO does not require that the musicians work full time or continuously in order to continue to perform with the Symphony. However, we find that the Regional Director relied too heavily on this factor, and we find *Pennsylvania Academy* distinguishable. In that case, the Board majority found that models who signed contracts with the Academy for each semester were independent contractors. In so finding, the Board relied, in large part, on the fact that the employer drew up a list of class dates and times for which a model would

be needed, and the models could choose the available, individual classes during which they wished to work. The Board found that the models thus exercised complete control over their own schedules and hours. Thus, the Board noted that the models' freedom to control their own schedule was "sweeping." 343 NLRB at 847.

Here, every season the musicians decide whether and for which programs they wish to work for the Orchestra.[4] But once they are selected to work in relation to a particular program, the musicians' control over their worktime ends. Unlike the models in *Pennsylvania Academy*, who could simply appear or not appear at any scheduled classes, the musicians are required to attend all rehearsals on dates and at times set by the music director and all performances on dates set by the Symphony. Unlike a true independent contractor, for example, a roofer, who is hired to do a job but can mutually arrange with the owner or general contractor when to do it and control how long it takes, once they sign up for a program, the musicians have no control over their worktime.

During the performance itself, the music director continues to maintain control over the manner and means by which the result is accomplished. Unlike a soloist who is hired to render a piece of music in the manner of his or her choice, here, the music director makes the artistic choices and directs the musicians accordingly. He may also vary from the printed music, consistent with his personal artistic vision, and he determines the precise volume, pitch, and blend of the ensemble. In sum, the music director has complete and final authority over how the musicians perform at both rehearsals and concert performances. See, e.g., *BKN, Inc.*, 333 NLRB at 144 (noting that through the revisions and suggestions made by the editors and producers, the employer exercises extensive control over the details of the writers' work); *Musicians Local 655 (Royal Palm Dinner Theatre)*, 275 NLRB 677, 682 (1985) (finding that where the employer exercises complete control over the manner and means by which the desired result is accomplished, the person performing the service is an employee). Cf. *Seattle Opera v. NLRB*, 292 F.3d 757, 765 (D.C. Cir. 2002) (enforcing Board decision finding auxiliary choristers to be statutory employees where the employer possesses the right to control them "in the material details of their performance").

[4] The LSO's information packet, which was sent to all musicians, stated that its principal players were required to work a specific number of the designated programs in 2006–2007, and the LSO added a similar policy for section players in 2007–2008. Because, however, the LSO's president testified that the minimum number is a suggestion rather than a requirement, the Regional Director gave little weight to this "requirement."

Our dissenting colleague suggests that our holding is out of harmony with Board law, but it is exactly the ongoing control of the manner and means of performance exercised by the music director here that insures a harmonious product and serves to distinguish this case from those cited in the dissent. For example, in *Pennsylvania Academy,* supra, the Board found that the models were given instruction only on a "general pose." The form of the pose, including wardrobe, was left to the models' discretion. In the present case, the musicians are given precise instructions on the tone, volume, and content of the music and are subject to the continued supervision and direction of the conductor.[5]

Considering next whether the musicians enjoy entrepreneurial opportunity or suffer risk, we find that they do not. The musicians are paid a set fee for a set number of rehearsals and performances. The fees are unilaterally set by the Orchestra and there are no negotiations over

[5] Similarly, *DIC Animation City*, 295 NLRB 989, 991 (1989), is clearly distinguishable as the Board found in that case that "[t]he writer creates the story idea, the premise, the outline, and the script. The writer determines where and when to work, and owns the equipment used. The writer also determines whether to write stories as part of a team, and if the work is done on a team basis, which part each member writes." In *Boston After Dark,* 210 NLRB 38, 42–43 (1974), the Board did not discuss the alleged employer's control over the manner and means of the freelance writers' and artists' performance, but the only evidence of such control was the editing of their submissions rather than any ongoing supervision as exists here. In *American Guild of Musical Artists, AFL-CIO*, 157 NLRB 735, 736 fn. 1 (1966), the individuals at issue were "guest artists" not regular members of the orchestra or ballet and the Board stressed that, as such, the manager, director, and choreographer "exercised little, if any, control or supervision over the manner in which [they] . . . danced their roles in rehearsals and in the actual performances." In *American Broadcasting Co.*, 117 NLRB 13, 17 (1957), "The actual composition of the music [wa]s normally done at the composer's studio located in his home. Only a small proportion of the material prepared by the composer [wa]s submitted to the producer for his approval, the balance being accepted as is. As to the materials submitted for his approval, the producer [could] suggest revisions to the composer, which the composer [could] accept or reject." In *Young & Rubicam International,* 226 NLRB 1271, 1272–1273 (1976), the photographers at issue cast models and searched for the location of the shoot, which was typically the photographer's studio, and otherwise "select[ed] the photographic means by which the art director's instructions . . . are carried out." In fact, the difference between this case and all of these cases is illustrated by the Board's analogy in *Young & Rubicam*: "When one engages a contractor to build a house, the contractor does not become any less independent because the purchaser determines the kind of house, where it is to be placed, the kind of materials to be used, the times of construction, or even the times of day when building shall take place." Id. at 1275. Here, however, the purchaser remained on the construction site throughout the rehearsals and performances, giving detailed instructions to the musicians on how to construct the musical piece. Finally, *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989), also cited in the dissent, is clearly distinguishable as there the sculptor at issue "worked in his own studio in Baltimore, making daily supervision of his activities from Washington practicably impossible."

such fees. The musicians do not receive more or less money based on ticket sales, or how well or poorly they perform in a given performance. In addition, there is no indication that the musicians can assign or sell their seat in the Orchestra. See *BKN,* supra, 333 NLRB at 145 (writers had no substantial proprietary interest and no significant entrepreneurial opportunity for gain or loss when writing scripts for employer).

The fact that the musicians can decide not to work in a particular program or request to work in more programs does not mean that they enjoy an opportunity for entrepreneurial gain suggesting a finding that they are independent contractors. The choice to work more hours or faster does not turn an employee into an independent contractor. To find otherwise would suggest that employees who volunteer for overtime, employees who speed their work in order to benefit from piece-rate wages, and longshoremen who more regularly appear at the "shape up" on the docks would be independent contractors. We reject that notion.[6]

Nor does the fact that the musicians can work for other orchestras weigh heavily in favor of a finding of independent contractor status. For example, in *BKN, Inc.*, supra, 333 NLRB at 145, the Board found that artists and designers who performed work for more than one employer were employees rather than independent contractors.[7] Part-time and casual employees covered by the Act often work for more than one employer. Cf. *KCAL-TV*, 331 NLRB 323, 323 (2000) ("Quite obviously, an individual who works parttime for more than one employer may be eligible to vote in an appropriate unit of each employer's employees."). The fact that musicians hold other jobs simply reflects the part-time nature of LSO's performance schedule. Moreover, the Board has repeatedly held that employees in certain industries, such as the entertainment industry, typically have intermittent working patterns, and has accommodated that fact, for example, in establishing the eligibility formula for voting in an election, rather than excluding such workers from the Act's coverage as independent contractors. See, e.g., *Kansas City Repertory Theatre, Inc.,* 356 NLRB No. 28 (2010). We thus give little weight to this factor in the context of this case.[8]

Considering next whether the musicians' work is part of the Orchestra's regular business, we find it is. The Orchestra is in the business of providing live music in its region. The musicians are in the business of performing music, and thus their work is part of the employer's regular business. See, e.g., *BKN,* supra, 333 NLRB at 145 (holding that employee-writers clearly performed functions that were an essential part of the employer's normal business). Contrast *Pennsylvania Academy*, supra, 343 NLRB at 847 (explaining that the employer is in the business of providing instruction to art students, while models are in the different business of modeling). The success and failure of the LSO is dependent on the services rendered by the musicians, and the Orchestra cannot conduct its business without them. See, e.g., *Arizona Republic*, 349 NLRB 1040, 1046 (2007) (finding that the distribution of newspapers was an integral part of the employer's business, which favored employee status for carriers). Accordingly, we find that this factor supports a finding of employee status.[9]

[6] We recognize that our assessment of this factor is in tension with the court's in *Lerohl v. Friends of Minnesota Sinfonia*, 322 F.3d 486, 491–492 (8th Cir. 2003), cert. denied 540 U.S. 983 (2003). But that case was decided under the Americans with Disabilities Act and Title VII and has been criticized. See Clement, *Lerohl v. Friends of Minnesota Sinfonia: An Out of Tune Definition of "Employee" Keeps Freelance Musicians From Being Covered by Title VII*, 3 DePaul Bus. & Comm. L.J. 489 (2005). Moreover, as explained above, the test here considers multiple factors and the facts in *Lerohl* are distinguishable in a number of relevant respects, for example, the musicians in that case were paid on a "per-concert basis." 322 F.3d at 488. In other respects, the court's opinion does not reveal whether the facts in that case parallel those here, for example, whether musicians were required to attend rehearsals after being selected for a program.

[7] Our dissenting colleague distinguishes *BKN* on the basis that in that case, there were "[n]umerous other factors" that weighed in favor of employee status. Similarly, here, as discussed throughout this decision, other factors weigh in favor of employee status, and accordingly, as in *BKN*, the fact that the musicians are allowed to work for other orchestras does not compel an independent contractor finding.

[8] Our dissenting colleague finds Board cases involving the eligibility of part-time or intermittent workers to be inapposite. They are cited here, however, only to illustrate that the Board does not consider the facts that individuals may work for other employers and may have intermittent working patterns to be dispositive of their employee status.

In the two Board cases cited in the dissent, the individuals at issue were paid a set fee for performance regardless of how much or how little time they spent accomplishing the job. See *DIC Animation*, 295 NLRB at 990 ("the Employer pays a flat fee for the script"), and *Young & Rubicam*, 226 NLRB at 1274 ("Except in rare case in which a 'day rate' is paid for certain types of work, the Employer compensates the photographer for his services with a flat fee."). Thus, they enjoyed entrepreneurial opportunity and suffered risk because if they did the job faster they could take other jobs and if they did the job slower they could not, but no such opportunity or risk exists here.

[9] Cf. *Haines v. Kavanagh*, 70 F.Supp. 705, 710 (D.C. Mich. 1947) (musicians were found to be employees under the Federal Unemployment Tax Act, Social Security Act, and Federal Insurance Contributions Act where, inter alia, music was an "essential part" of the taxpayer's business, and the "success of failure" of the business "depended largely on the manner in which the . . . musicians rendered their services."). In arguing that "the individual musician's professional occupation is distinct from that of the Lancaster Symphony," the LSO asserted "that—by definition—a single, individual musician cannot be a symphony orchestra." But neither can a catcher be a baseball team or a single cashier be a grocery store. The LSO's argument cuts the facts so finely as to render this factor meaningless.

The method of payment also points to employee status. The LSO establishes and controls the rate of compensation, and the rate is not negotiable. While the musicians are not paid a traditional hourly wage, the payment scheme approximates that. The musicians receive a set payment for each appearance at a rehearsal or concert. Such appearances are divided into 15-minute increments and the musicians receive an added payment of either $12 or $9.45 for each 15 minutes over 2-1/2 hours. In other words, the musicians are not paid for the job such that they can effectively earn more by completing the job more quickly (like our roofer). Rather, they are paid based on the time they spend working for the Orchestra. This indicates employee status. See *Roadway Package System*, supra, 326 NLRB at 852 (employee status found in part because "unlike the genuinely independent businessman, the drivers' earnings do not depend largely on their ability to exercise good business judgment, to follow sound management practices, and to be able to take financial risks in order to increase their profits"). Cf. *American Broadcasting Co.*, 117 NLRB 13, 18 (1957) (fact that composers' compensation was "normally not based upon a weekly or hourly rate" supported finding of independent contractor status).[10]

Consideration of each of the remaining factors points in no clear direction. The musicians supply their own instruments and clothes, but the Orchestra supplies music, stands, chairs, and the concert hall.[11] The musicians are highly skilled, but so are many other types of employees who are covered by the Act. See, e.g., *Metropolitan Opera Assn.,* 327 NLRB 740 (1999 (members of bargaining unit consisting of solo singers, principal dancers, members of the corps de ballet, and choristers possess "unique" skills); *American League of Professional Baseball Clubs*, 180 NLRB 190 (1969) (directing an election in a unit of baseball umpires).

The LSO believes it is creating an independent contractor relationship when it retains the musicians and requires that they sign a contract acknowledging that characterization of the relationship, but there is no evidence that the musicians agree with that assessment. To the contrary, Ricky Staherski, a musician who has been playing for the LSO for 32 years, testified that he considers himself to be an employee of the LSO, rather than an independent contractor. Moreover, at least 30 percent of the musicians signed cards reflecting their interest in being represented as employees in collective bargaining with the Symphony.

Consideration of the length of time musicians are employed is also inconclusive. The fact that the musicians are hired to work in specific programs for a fixed 1-year period favors independent contractor status. However, many of the musicians return year after year and have worked for the LSO for long periods of time. Three or four have worked for the Symphony for over 30 years and one for over 59 years. This disparity in musicians' tenure does not conclusively support either a finding of employee or independent contractor status.

In its posthearing brief, the LSO argued that independent contractor status is supported by the fact that the musicians are engaged in a "distinct professional occupation." But professional musicians work in many settings and perform as employees in some and independent contractors as others. Thus, as construed by the LSO, consideration of this factor also provides little guidance.

Conclusion

In sum, weighing all the above factors, we find that the record establishes that there is an employer-employee relationship between the musicians and the Orchestra. Significantly, the Orchestra possesses the right to control the manner and means by which the performances are accomplished. That is, they choose the music, decide how it will be played, when and how it will be rehearsed, and how the musicians will appear on stage. Further, the musicians do not bear any entrepreneurial risk of loss or enjoy any opportunity for entrepreneurial gain; their service is part of the Orchestra's regular business; and they are paid on a modified hourly basis. Each of these factors weighs in favor of finding the musicians are employees.

Other factors militate in favor of independent contractor status or point in no clear direction. Among the former are the facts that the musicians may work for other orchestras; provide their own instruments; contract to play in specified performances during a 1-year period; and are highly skilled. We have fully considered the countervailing factors, but on balance, we find that the factors favor finding the symphony orchestra musicians to be statutory employees rather than independent contractors. Accordingly, we conclude that the LSO has not met its burden of showing that the musicians should be

[10] The dissent discounts this factor, suggesting that the musicians' rate of pay is "per service" rather than per hour. But a "service" is defined as a 2-1/2-hour period and the musicians are paid an additional amount for each 15 increment of time they work past the 2-1/2 hours "service." This may not be an hourly wage, but it is certainly payment based on time rather than per job. In contrast, as noted above, in *Young & Rubicam*, 226 NLRB at 1274, the Board found, "Except in rare case in which a 'day rate' is paid for certain types of work, the Employer compensates the photographer for his services with a flat fee."

[11] The dissent suggests that the musicians' supplying of their own instruments is the more weighty consideration because, without instruments, there can be no music. But without the performance hall and accompanying instrumentalities, no money can be made from the music and we are considering the nature of an economic relationship here, not a purely artistic one.

excluded from the protections of the Act on the basis that they are independent contractors.

ORDER

It is ordered that the petition be reinstated, and that this matter be remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. December 27, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

In finding the musicians at issue in this case to be employees, rather than independent contractors, my colleagues compose a decision that is not in harmony with Board law or the record evidence. Their strained application of the common-law agency test used to categorize individuals as employees or independent contractors fails to take into account the collaborative artistry involved here, the high level of skill and professionalism present, and the practical realities of the modern musical performance world. Upon an independent assessment of the common-law factors, I would find, in agreement with the Regional Director, that the factors weigh in favor of finding the musicians to be independent contractors.

Turning first to the Lancaster Symphony Orchestra's (Symphony or Employer) right of control over the musicians' performance of their work, my colleagues find that this factor weighs heavily in favor of finding employee status. In doing so, they point to the Symphony's control over the time, place, and conduct of the rehearsals and performances, as well as certain artistic aspects of the performance. In my view, their analysis does not sufficiently take into account the nuances in extant precedent concerning the control factor as it applies to individuals in creative professions. In this context, Board precedent permits an employer a measureable degree of control over the individual's performance of a job without finding the individual to be an employee. See *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 847 (2004); *DIC Animation City*, 295 NLRB 989, 991 (1989); *Young & Rubicam International*, 226 NLRB 1271, 1275–1276; *Boston After Dark*, 210 NLRB 38, 42–43 (1974); and *American Guild of Musical Artists*, 157 NLRB 735 (1966).[1] Rather than focusing exclusively on the hiring party's control over certain administrative and creative aspects of an individual's work in determining the right of control, the Board has found the individual's retention of discretion over when and how often he or she will work for the employer to be instructive. See *Pennsylvania Academy of the Fine Arts*, 343 NLRB at 847 (models' control over whether and when to work for the employer was strong evidence of independent contractor status); and *Boston After Dark*, 210 NLRB at 42–43 ("crucial element" separating writers, cartoonists, and photographers from regular unit employees was their ability to determine when and if they will work for the employer). Consistent with this Board precedent, the Eight Circuit has stated, specifically as to symphony musicians, that the relevant inquiry on the right of control factor is whether the musicians retain discretion to accept or decline to work with the employer and to play elsewhere, not whether the employer tells the musicians where to sit or when to play during a rehearsal or a concert. See *Sinfonia*, 322 F.3d at 491.

Thus, while I acknowledge that the Employer retains a measure of control over the musicians' work once they have chosen to perform with the Symphony, I believe the more instructive inquiry as to the control question is whether the musicians retain control over the extent to which they committed their available professional time to the Employer, as well as their ability to accept employment elsewhere while working for the Employer. On this point, the record is clear that the musicians themselves retain this significant control.

Importantly, prior to the beginning of each symphony season and before committing to any performances, the Symphony sends the musicians an information packet stating the programs for the upcoming season and seeking the musicians' interest and availability. The musicians review the information and have the discretion to pick and choose among available engagements. The Symphony does not require the musicians to play in

[1] The Board's precedent in this regard is consistent with that of the circuit courts. See *Lerohl v. Friends of Minnesota Sinfonia*, 322 F.3d 486 (8th Cir. 2003); and *Hi-Tech Video Productions, Inc. v. Capital Cities/ABC, Inc*., 58 F.3d 1093 (6th Cir. 1995).

It is well recognized that, in determining if individuals are independent contractors or statutory employees, the Board applies the common-law agency test depending on an assessment of all indicia, with no factor being determinative. Pertinently, as the majority acknowledges, the same set of factors found decisive in one case may be unpersuasive when balanced against a different set of opposing factors in another. Yet, in an attempt to discount my analysis, the majority exhaustively focuses on isolated factual distinctions and misses the big picture. The distinctions drawn do not detract from my point that the overall weighting of factors in the cited cases clearly supports finding that the comparable performers at issue here are independent contractors.

every performance program. Instead, the musicians determine the programs in which they will play based on their interest and availability and whether the repertoire requires their instruments. Once a musician has signed up to participate in a series, he or she may cancel the appearance without consequence to future employment.

In addition, the musicians are not required to play exclusively for the Employer, and they are free to seek other avenues of employment. On this point, as the Regional Director noted, although approximately 120 musicians perform with the Symphony in any given season, fewer than 10 musicians participated in every program in the most recent season. It is thus not surprising that, in addition to working with the Symphony, many of the musicians regularly play with other musical ensembles and work as music teachers. For its part, as the Symphony president and CEO testified, the Symphony encourages the musicians to work for other employers, particularly if there is more money to be made with another employer or if the work will permit the musician to perform with a more prominent ensemble.

Looking beyond the musicians' control over where, when, and for whom they will work, I disagree with my colleagues' conclusion that the musicians' control over their work ends once they decide to perform with the Symphony. To be sure, at that point, the Symphony controls the conduct of the rehearsals and performances, as well as oversees certain artistic aspects of a performance. But, practically speaking, work by creative profession independent contractors is often performed to the specifications and on the timetable of the hiring party, but that structure does not convert an independent contractor to an employee. See *Creative Non-Violence v. Reid*, 490 U.S. 730, 750–751 (1989) (Court found a sculptor to be an independent contractor even though the nonprofit association that hired him defined the scene to be sculpted and specified the details of the sculpture's appearance, including its scale and the materials to be used); and *Radio City Music Hall Corp. v. U.S.*, 135 F.2d 715, 717–718 (2d Cir. 1943) (court found performers to be independent contractors even where the producer controlled the timing and conduct of rehearsals and directed the performers to "weld" together the performance). This is particularly true where, as here, the employer's artistic control and direction is primarily related to the end product, i.e., the sound and look of the symphony as a whole, not the manner in which the individual musicians providing their services prepare for and perform the work.[2] See *DIC Animation City*, 295 NLRB at 991; *Young & Rubicam International*, 226 NLRB at 1275–1277; and *American Broadcasting Co*., 117 NLRB 13, 18 (1957). Thus, based on the above discussion of the right of control factor, I would find that the record evidence weighs in favor of finding the musicians to be independent contractors.

As to the musicians' entrepreneurial opportunity for gain, my colleagues find that they have no such opportunities, but I disagree. Board precedent is clear that the freedom to take as many or as few jobs as one wishes and to work for various employers is highly indicative of independent contractor status. See, e.g., *Pennsylvania Academy of the Fine Arts*, 343 NLRB at 847. Here, as noted above, the musicians decide if, when, and how many services they will perform for the Symphony in a given season. In doing so, the musicians control how much, or how little, money they will earn by working for the Symphony. In addition, the musicians can, and do, work for other musical ensembles and employers. They thus have the opportunity to maximize outside employment and earn more income.[3] Indeed, given that the maximum remuneration for work with the Symphony in a season is approximately $3600, performing with the Symphony could not likely be the musicians' sole form of employment and, presumably, they have to secure work elsewhere. Consistent with precedent, I would find that the musicians enjoy entrepreneurial opportunity for gain and that this fact weighs in favor of finding the musicians to be independent contractors. See *DIC Anima-*

[2] As additional evidence of the Symphony's control over the musicians, my colleagues point to the attendance, conduct, and dress guidelines, as well as the Symphony's disciplinary authority. As to guidelines (i.e., attend rehearsals, maintain good posture, do not talk during performance or bows, and wear black formal attire), they are consistent with traditional symphony preparation and performance decorum. The guidelines thus merely reflect the status quo of most performance ensembles and, as such, I do not find them to be persuasive evidence of the Symphony's control over the musicians work performance. Similarly, unlike my colleagues, I do not find the limited evidence of the Symphony's disciplinary action to be probative of the control question. At the time of the Regional Director's decision, the Symphony had been in existence for almost 60 years and had employed countless musicians. That the Symphony has issued one written warning in this period does not, in my view, come anywhere close to being sufficient evidence to demonstrate the Employer's right to control the musicians in their work.

[3] Citing to several Board cases, my colleagues find that the musicians' ability to work for other employers does not weigh in favor of finding independent contractor status. I find the cited cases to be distinguishable and inapposite. In this regard, in *BKN, Inc*., 333 NLRB 143 (2001), the Board found the artists and designers to be employees even though they were free to work for other employers. But the Board's finding was not based on this fact alone. Numerous other factors weighed in favor of finding the artists and designers to be employees. In my view, such is not the case here. In addition, I find my colleagues' citation to cases concerning the voter eligibility status of part-time and intermittent workers to be inapposite. The employee versus independent contractor question was not at issue in *KCAL-TV*, 331 NLRB 323 (2000), and *Kansas City Repertory Theatre*, 356 NLRB No. 28 (2010).

tion City, 295 NLRB at 990; and *Young & Rubicam International*, 226 NLRB at 1274–1275; see also *Sinfonia*, 322 F.3d at 492.

As to most of the remaining factors, my colleagues conclude that they either weigh in favor of finding employee status or point in no clear direction. I disagree and would find, consistent with precedent and the record, that each of these factors weigh in favor of finding the musicians to be independent contractors. The musicians here are engaged in the distinct occupation of musical performance. In addition, it is uncontested that they are highly skilled at playing their instruments and in the art of musical performance. They do not receive any training from the Employer. Indeed, once a musician agrees to perform with the Symphony, the Employer sends the musicians the relevant sheet music and the musicians are expected to be fully prepared and versed in the music when they arrive at the first rehearsal. Gauging their familiarity with the provided music, each musician decides how much, if at all, he or she will practice prior to the beginning of rehearsals. The musicians are not compensated for their practice time. Under extant precedent, these facts weigh in favor of finding the musicians to be independent contractors. See *Pennsylvania Academy of the Fine Arts*, 343 NLRB at 847; and *Young & Rubicam International*, 226 NLRB at 1276; see also *Sinfonia*, 322 F.3d at 491.

Regarding the provision of work instruments, while the Employer provides the performance hall, chairs, and music stands, the musicians provide their own instruments and dress outfits for the concerts. In my view, the fact that the musicians supply the most important and necessary performance tool—the musical instrument—weighs in favor of finding the musicians to be independent contractors. See *Strand Art Theatre*, 184 NLRB 667 (1970); and *American Guild of Musical Artists*, 157 NLRB at 736 fn. 1. On this point, without the musical instrument, there could be no music. As such, unlike my colleagues, it is difficult for me to place the musicians' instruments in the same category as a chair or music stand.

As to the musicians' length of employment, once a musician decides to perform with the Symphony, the musician signs the "Musician Agreement Form." This contract stipulates the musician's employment with the Symphony to be a for a 1-year period. And although some musicians return to work for the Employer on a yearly basis, the record indicates that the majority of the musicians have, as the Regional Director found, a far more tenuous connection to the Symphony. This lack of evidence as to an ongoing employment relationship thus weighs in favor of finding the musicians to be independent contractors. See *Pennsylvania Academy of the Fine Arts*, 343 NLRB at 847. In addition, although not dispositive, the "Musician Agreement Form" reflects the musicians' understanding of their independent contractor status. Consistent with the independent contractor status established in the form, the musicians receive an IRS Form 1099 for miscellaneous income rather than an IRS Form W-2 for wages. See id.

Finally, regarding the method of payment, although my colleagues find that the musicians' compensation "approximates" an hourly wage rate, their finding is not supported by the record. In this regard, it is clear from the Regional Director's decision that the musicians' rate of pay is per service, i.e., per rehearsal, or performance. A typical service lasts approximately 2-1/2 hours and, for that service, principal players receive $75 and section players receive $60.[4] In addition, the musicians choosing to take part in the preperformance discussions with audience members are compensated a set rate for that talk. The Board has found such per-service compensation rates to support a finding of independent contractor status. See *Pennsylvania Academy of the Fine Arts*, 343 NLRB at 847; and *Young & Rubicam International*, 226 NLRB at 1276. In addition, as noted, all musicians receive IRS Form 1099s, the Symphony does not deduct payroll taxes, and the musicians do not receive the fringe benefits received by the Symphony's full-time employees. These facts further indicate an independent contractor relationship. See, e.g., *Pennsylvania Academy of Fine Arts*, supra; see also *Sinfonia*, 322 F.3d at 492; and *Hi-Tech Video Productions, Inc*., 58 F.3d at 1097. Moreover, contrary to my colleagues' finding, the fact that the per-service pay rate is set by the Symphony and is not negotiable does not cut against a conclusion that the musicians are independent contractors. See *DIC Animation City*, 295 NLRB at 989 (Board found writers to be independent contractors even though their pay rates were nonnegotiable).

Based on the foregoing, even acknowledging that the Symphony is in the business of providing live music and that the musicians' work is part of that regular business, I would find that these two factors weighing in favor of

[4] In finding the method of payment to approximate an hourly wage, the majority focuses on the fact that the musicians are compensated in 15-minute segments in the event a service lasts longer than 2-1/2 hours. In relying on this supplementary compensation rate, my colleagues ignore the weight of the record evidence, which establishes that the musicians are primarily paid a set rate for each service performed for the Employer.

finding the musicians to be employees are outweighed by the myriad other factors, discussed above, demonstrating the independent contractor status of the musicians. In applying the factors to reach the contrary conclusion, the majority's decision is inconsistent with Board precedent and the record evidence. Accordingly, I dissent.

Dated, Washington, D.C. December 27, 2011

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD