

Nos. 11-1255, 11-1276

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MUSICAL ARTS ASSOCIATION

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

**AMERICAN FERDERATION OF MUSICIANS OF THE UNITED STATES
AND CANADA, AFL-CIO**

Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JILL A. GRIFFIN
Supervisory Attorney

GREG P. LAURO
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2949
(202) 273-2965

LAFE E. SOLOMON
Acting General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MUSICAL ARTS ASSOCIATION)	
)	
Petitioner)	
)	Nos. 11-1255 & 11-1276
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case No.
)	8-CA-38834
)	
Respondent)	
)	
AMERICAN FEDERATION OF MUSICIANS)	
OF THE UNITED STATES AND CANADA,)	
AFL-CIO)	
)	
Intervenor)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

A. *Parties and Amici:* The Musical Arts Association (“the MAA”) is the petitioner before the Court; the MAA was the respondent before the Board. The Board is the respondent before the Court; its General Counsel was a party before the Board. The American Federation of Musicians of the United States and Canada, AFL-CIO (“the AFM”) is the intervenor before the Court; the AFM was the charging party before the Board.

B. *Ruling Under Review*: The case involves the MAA's petition to review, and the Board's cross-application to enforce, a Decision and Order the Board issued on June 28, 2011 (356 NLRB No. 166).

C. *Related Cases*: This case has not previously been before this Court or any other court. The Board is not aware of any related cases pending in or about to be presented to this Court or any other court.

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

Dated at Washington, DC
this 10th day of January, 2012

TABLE OF CONTENTS

Headings	Page(s)
Statement of subject matter and appellate jurisdiction	1
Statement of the issue presented	3
Relevant statutory provisions	3
Statement of the case	3
Statement of the facts	4
I. The Board’s findings of fact	4
A. The MAA’s operations, and the AFM’s and Local 4’s representation of musicians	4
B. For over 25 Years, the MAA recognizes and bargains with the AFM and Local 4 as the joint-bargaining representatives of its musicians, with each union granted a specific area of bargaining responsibility	4
1. The MAA’s collective-bargaining agreements with Local 4 cover local working conditions and local media, and refer to the AFM’s authority over national media issues	4
2. From 1982 through 2010, the MAA adopts and applies the AFM’s national media agreements, two of which recognize the AFM as the musicians’ bargaining representative for the covered media activities	6

Headings

Page(s)

- a. The MAA is signatory to each of the AFM’s national Audio-Visual Agreements from 1982-2007, the most recent of which recognizes the AFM as the bargaining representative for the covered AV activities.....7
- b. The MAA continues its pattern of bargaining with the AFM over national media issues, adopts the AFM’s 2000-2002 Internet Agreement, and then agrees to extend it through 2005.....9
- c. The MAA adopts the AFM’s 2006-2009 Live Recording Agreement, which recognizes the AFM as the bargaining representative for the specified recording activities.....11
- 3. The foregoing contracts and the AFM’s by-laws were part of an industry practice of dividing representation between the AFM and its affiliated locals.....12
- 4. In 2007-2009, the MAA continues to bargain with the AFM over national media issues when it participates in negotiations for an Integrated Media Agreement to replace the AV, Internet and Live Recording Agreements.....15
- C. In September 2009, after decades of recognizing and bargaining with the AFM as its employees’ representative for national media issues, the MAA states that it will only bargain with Local 4 regarding those issues and refuses to bargain with the AFM.....15
- II. The Board’s Conclusions and Order.....17
- Standard of review.....18
- Summary of Argument.....19

Headings	Page(s)
Argument.....	22
Substantial evidence supports the Board’s finding that the MAA violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from, and refusing to bargain with, the AFM as its employees’ joint collective-bargaining representative for the media-related issues covered by its collective-bargaining agreements with the AFM.....	22
A. An employer may recognize two or more unions as its employees’ joint collective-bargaining representative, and, if it does so, it violates Section 8(a)(5) and (1) of the Act by refusing to bargain with one of those unions.....	22
B. Substantial evidence supports the Board’s finding that the MAA violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from, and refusing to bargain with, the AFM as its employees’ joint collective-bargaining representative.....	26
C. The MAA points to nothing that warrants disturbing the Board’s reasonable findings.....	31
1. The Board did not order the MAA to bargain with two unions acting as dueling “exclusive” bargaining representatives.....	32
2. The Board’s Order is not “unprecedented” or “unworkable”.....	36
3. The MAA did not bargain with the AFM acting merely as the agent of Local 4.....	40
Conclusion.....	43

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Brockton Hospital v. NLRB</i> , 294 F.3d 100 (D.C. Cir. 2002)	18
* <i>CBS Broad., Inc.</i> , 343 NLRB 871 (2004)	23, 24, 25
<i>Chicago Magnesium Castings</i> , 256 NLRB 668 (1981)	42
<i>Exxel/Atmos, Inc. v. NLRB</i> , 28 F.3d 1243 (D.C. Cir. 1994)	22, 23
* <i>General Electric Co.</i> , 150 NLRB 192 (1964), enforced 418 F.2d 736 (2d Cir. 1969)	25, 29, 30, 37
<i>Holiday Hotel & Casino</i> , 228 NLRB 926 (1977), enforced 604 F.2d 605 (9th Cir. 1979).....	41
<i>Holly Farms Corp. v. NLRB</i> , 517 U.S. 392 (1996).....	18
<i>Local Lodge No. 1224 Int’l Assn. of 30 Machinists, AFL-CIO (Bryan Manufacturing) v. NLRB</i> , 362 U.S. 411 (1960).....	23
* <i>M&M Trans. Co., Inc.</i> 329 NLRB 73 (1978)	25, 29
<i>Medo Photo Supply Corp. v. NLRB</i> , 321 U.S. 678 (1944).....	33

* Authorities upon which we chiefly rely are marked with asterisks.

Cases	Page(s)
<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693 (1983).....	22
<i>NLRB v. Creative Food Design, Ltd.</i> , 852 F.2d 1295 (D.C. Cir. 1988).....	23
<i>NLRB v. Mead Foods, Inc.</i> , 353 F.2d 87 (5th Cir. 1965)	24, 26, 38
* <i>NLRB v. National Truck Rental Co.</i> , 239 F.2d 422 (D.C. Cir. 1956).....	23
* <i>NLRB v. Ozanne Construction Co.</i> , 112 F.3d 219 (6th Cir. 1997)	23, 24, 25, 25
<i>Newell Porcelain Co.</i> , 307 NLRB 877 (1992), <i>enforced sub nom. United Electrical Workers v.</i> <i>NLRB</i> , 986 F.2d 70 (4th Cir. 1993).	34, 35
<i>Oakwood Care Center</i> , 343 NLRB 659 (2004)	34
<i>R.C. Aluminum Industrial, Inc. v. NLRB</i> , 326 F.3d 235 (D.C. Cir. 2003).....	23, 36
* <i>Radio Corp. of America</i> , 135 NLRB 980 (1962)	24, 25, 29
* <i>Reynolds Metal Co.</i> , 310 NLRB 995 (1993)	24, 25, 29
<i>Tahoe Nugget, Inc.</i> , 227 NLRB 357 (1976), <i>enforced</i> 584 F.3d 293 (9th Cir. 1978)).....	41

* Authorities upon which we chiefly rely are marked with asterisks.

Cases	Page(s)
<i>Teamsters Local Union No. 171 v. NLRB</i> , 863 F.2d 946 (D.C. Cir. 1988).....	18
<i>Traction Wholesale Ctr. Co. v. NLRB</i> , 216 F.3d 92 (D.C. Cir. 2000).....	18
* <i>Tree-Free Fiber Co.</i> , 328 NLRB 389 (1999).....	23, 24
<i>United Electrical Workers v. NLRB</i> , 986 F.2d 70 (4th Cir. 1993).....	35
<i>United States Testing Co., Inc. v. NLRB</i> , 160 F.3d 14 (D.C. Cir. 1998).....	18
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	18
<i>Vermont Marble Co.</i> , 301 NLRB 103 (1991).....	24

* Authorities upon which we chiefly rely are marked with asterisks.

FEDERAL STATUTES

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

Section 7 (29 U.S.C. § 157).....	17
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	22
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	3, 17, 19, 22, 26
Section 9(a) (29 U.S.C. § 159(a))	22, 32
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(b) (29 U.S.C. § 160(b)).....	23
Section 10(e) (29 U.S.C. § 160(e))	2, 18, 23
Section 10(f) (29 U.S.C. § 160(f))	2

GLOSSARY

- A.The parties' Joint Appendix
- ActThe National Labor Relations Act (29 U.S.C §§ 151 *et seq.*)
- AFM.....The American Federation of Musicians of the United States and Canada, AFL-CIO
- AV AgreementThe AFM's Symphony, Opera, or Ballet Orchestra Audio-Visual Agreement, which was adopted by the MAA
- BoardThe National Labor Relations Board
- Br.The Opening Brief of the Musical Arts Association to this Court
- CBACollective-bargaining agreement
- Internet Agreement.... The AFM's Symphony, Opera, or Ballet Orchestra Internet Agreement, which was adopted by the MAA
- Live Recording Agreement The AFM's Symphony, Opera, or Ballet Orchestra Live Recording Agreement, which was adopted by the MAA
- Local 4The Cleveland Federation of Musicians, Local 4 of the AFM
- MAAThe Musical Arts Association
- MMCThe Managers' Media Committee
- Trade Agreement.....The CBA between the MAA and Local 4

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Nos. 11-1255 & 11-1276

MUSICAL ARTS ASSOCIATION

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

**AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES
AND CANADA, AFL-CIO**

Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of the Musical Arts Association (“the MAA”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a final Board Decision and Order issued against

the MAA on June 28, 2011, and reported at 356 NLRB No. 166. (A. 15-31.)¹ The Board found that the MAA unlawfully withdrew recognition from, and refused to bargain with, the American Federation of Musicians of the United States and Canada, AFL-CIO (“the AFM”), after the MAA had recognized the AFM and its local affiliated union as its employees’ joint collective-bargaining representative, with the AFM acting as the joint-exclusive representative concerning media-related matters covered by certain agreements between the MAA and the AFM. (A. 15, 30.) The AFM intervened on the Board’s behalf. The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Order is final with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Company’s petition for review and the Board’s cross-application for enforcement were timely filed, as the Act imposes no time limit on such filings.

¹ Record citations are to the Joint Appendix, and are abbreviated as set forth in the Glossary. When a record citation contains a semicolon, references preceding it are to the Board’s findings, and references following it are to the supporting evidence.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the MAA violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by withdrawing recognition from, and refusing to bargain with, the AFM as its employees' joint collective-bargaining representative for media and related matters covered by the MAA's collective-bargaining agreements with the AFM.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the attached Addendum.

STATEMENT OF THE CASE

Acting on charges filed by the AFM, the Board's General Counsel issued a complaint against the MAA. The complaint alleged that the AFM, and the Cleveland Federation of Musicians, Local 4 of the AFM ("Local 4"), are joint collective-bargaining representatives of the MAA's musicians, and, therefore, the MAA violated Section 8(a)(5) and (1) of the Act by withdrawing its recognition of, and refusing to bargain with, the AFM. (A. 8-14.) After a hearing, the administrative law judge found that the AFM and Local 4 were the musicians' joint collective-bargaining representatives, and that the MAA had violated the Act as alleged. (A. 30.) Finding no merit to the MAA's exceptions, the Board affirmed the judge's findings and recommended order. (A. 15.)

I. THE BOARD'S FINDINGS OF FACT

A. The MAA's Operations, and the AFM's and Local 4's Representation of Musicians

The MAA is a non-profit corporation that operates the Cleveland Orchestra in Cleveland, Ohio, which employs approximately 100 musicians. (A. 15; 157.)

The AFM is an international union that represents musicians in locations across the United States and Canada. Local 4 is an affiliated local union of AFM, which represents musicians in the Cleveland area. (A. 15; 42, 84.)

B. For over 25 Years, the MAA Recognizes and Bargains with the AFM and Local 4 as the Joint-Bargaining Representatives of Its Musicians, with Each Union Granted a Specific Area of Bargaining Responsibility

1. The MAA's Collective-Bargaining Agreements with Local 4 Cover Local Working Conditions and Local Media, and Refer to the AFM's Authority over National Media Issues

Since at least 1967, the MAA and Local 4 have had a series of collective-bargaining agreements ("CBAs"), known as the "Trade Agreements," primarily covering the musicians' terms and conditions of employment pertaining to live performances, rehearsals for live performances, and local television and radio broadcasts. (A. 16-18, 24, 30; 242-332, 523, 645.) These agreements, including the 2006-2009 agreement, which was extended through 2012, provide that the MAA recognized Local 4 as the exclusive-bargaining representative of its musicians. (A. 16-18, 24; 304, 324-25, 554-55.)

The MAA's Trade Agreements with Local 4 have long referred to the AFM's by-laws and national media agreements (which are described below) in marking the split of bargaining authority between the two unions over local and national media issues. This division was memorialized in the 1967 Trade Agreement, which required AFM approval for the MAA to engage in certain delayed broadcasts of taped performances. (A. 16, 24; 551.) Further, both the 1967-1970 and the 2006-2009 Trade Agreements contained language stating that "[t]he rules and regulations of the [AFM] pertaining to recording will be applicable to all commercial recordings." (A 16, 27; 294, art. 13.4, 552, art. 28(d).) As described below (p. 14), these AFM by-laws provide that AFM Locals may only bargain over electronic-media issues with AFM approval. In addition, the 2006 Trade Agreement refers to the terms of the AFM's national media agreements regarding the musicians' compensation for "Electronic Services." (A. 17-18, 26; 252, art. 3.7.) Accordingly, while the local Trade Agreements contained limited media provisions, these were understood to refer to certain local television and radio broadcasts, and the making of non-commercial recordings for archival purposes, and did not displace the AFM as bargaining representative for national media issues. (A. 20; 68-69, 94-99, 103, 288-94, art. 12-13.)

2. From 1982 through 2010, the MAA Adopts and Applies the AFM’s National Media Agreements, Two of Which Recognize the AFM as the Musicians’ Bargaining Representative for the Covered Media Activities

Since at least the early 1980s, the MAA—like many orchestras across the country—entered into CBAs with the AFM, either individually or through multi-employer bargaining, regarding national media issues such as recording rights, internet distribution of digital recordings, and other audio-visual (“AV”) matters. (A. 16-18, 24, 27; 167-242.) For example, the MAA has been a signatory to the AFM’s three main national agreements: the Symphony, Opera, or Ballet Orchestra Audio-Visual Agreement (“AV agreement”); the Symphony, Opera, or Ballet Orchestra Internet Agreement (“Internet Agreement”); and the Symphony, Opera, or Ballet Orchestra Live Recording Agreement (“Live Recording Agreement”). (A. 15-18, 24; 167-242, 519-20, Stip. 1-10.)²

² Even prior to these media agreements, nationally distributed symphonic recording was subject to other AFM agreements. For example, the AFM had agreements with recording companies covering such activities known as the Phonograph Recording Labor Agreement (“Phonograph Agreement”). (A. 16; 58-59.) While orchestras were not direct parties thereto, many of them produced electronic media under such agreements’ terms. (*Id.*) Thus, for example, when the MAA produced a recording of Beethoven’s Ninth Symphony in the mid-1980s, it did so with a recording company, Telarc, under Telarc’s Phonograph Agreement with the AFM. (A. 154.)

a. The MAA is signatory to each of the AFM’s national Audio-Visual Agreements from 1982-2007, the most recent of which recognizes the AFM as the bargaining representative for the covered AV activities

The AFM’s AV agreements cover the commercial exploitation of electronic media where the audio and visual recordings of a performance are provided together. (A 16-17, 21-22; 173.) The MAA was signatory to the initial AV Agreement in 1982 and to each successor agreement, including the most recent from February 1, 2006 to January 31, 2008 (the “2006-2008 AV Agreement”). (A. 16-17; 47, 519, stip. 2-4.) The 2006-2008 AV Agreement contains a “union recognition” article by which the signatory orchestra—the MAA here—recognizes the AFM as “the exclusive bargaining representative of . . . musicians who are employed by the Employer in audio-visual activities covered by this Agreement.” (A. 17, 24; 175, art. III.)

Moreover, the national 2006-2008 AV Agreement, like the local Trade Agreements, acknowledges the joint representation of employees by the AFM and its local unions. Thus, it states that it applies only to musicians employed under the terms of a CBA with a local AFM affiliate. (A. 17, 24; 173, art. I.A.1.) It also contains language marking the split between matters covered by the national AV Agreement, and those subject to local bargaining. For example, the AV Agreement provides that it “shall not cover the release on local television of AV product broadcasted or syndicated solely within the geographical boundaries of a

Federation [AFM] local where the Employer is located.” (A. 17; 173, art. I.A.2.)

The 2006-2008 AV Agreement also provides that the AFM “shall exercise full authority to ensure that its local unions and member employees engaged in such [local] activities do nothing in derogation of” the Agreement’s terms. (A. 174, art. I.A.3.) Accordingly, it bars the inclusion in a “Local CBA” of any “less favorable” terms regarding matters covered by the AV Agreement. (*Id.*)

The MAA entered into the AV Agreements either individually or through multi-employer bargaining in which MAA officials often took leadership roles. For the AV Agreements covering the period from 1982 to 1999, orchestra managers met jointly with the AFM, but each decided on an individual basis whether to sign the resulting agreement. (A. 16-17; 519, stip. 4.) The MAA, for example, adopted “each and every provision” of the 1996-1999 AV Agreement through its January 16, 1998 letter of acceptance. (A. 16-17; 335, 519, stip. 4.) For the subsequent AV Agreements, a multi-employer bargaining organization—the Managers’ Media Committee (“MMC”)—negotiated on behalf of several orchestras, including the MAA, which had agreed to be bound by the resulting agreement. (A. 17; 336, 519, stip. 4.) MAA Executive Director Gary Hanson, who was also the MMC’s bargaining-committee chair at the time, signed off on a list of 67 orchestras, including the MAA (referred to therein as the “Cleveland Orchestra”), and presented it to the AFM for the negotiation of the 2006 AV

Agreement. (*Id.*) Thus, for over 25 years, the MAA was a party to the AFM's national AV Agreements, the last of which was negotiated with the MAA's executive director chairing the employers' negotiating committee, and through which the MAA recognized the AFM as its musicians' bargaining representative for the AV activities covered therein. (A. 24-25.)

b. The MAA continues its pattern of bargaining with the AFM over national media issues, adopts the AFM's 2000-2002 Internet Agreement, and then agrees to extend it through 2005

The AFM's Internet Agreement covers the commercial exploitation of digital audio media available for purchase on the Internet where no physical copy (such as a compact disc or "CD") is made available. (A. 17, 21-22; 55-56, 219-28, 337-40.) The MAA, along with 27 other orchestras, participated through the MMC in the negotiation of the initial Internet Agreement, effective from February 2, 2000 to January 31, 2002. In a letter "enthusiastically" recommending that orchestras approve the Agreement, then-MMC Chair Joseph Kluger referenced the AFM's historic role in negotiating national media agreements, stating:

This new Internet Agreement supplements, but does not replace, existing AFM electronic media agreements such as the Phonograph Record Labor Agreement and the Audio-Visual Agreement. These AFM agreements remain in force and will continue to govern the creation of television programs as well as the production of physical product (CD's, LP's, DVD's, audio or video tapes), which cannot be manufactured or sold under this Agreement.

(A. 17; 337.)

The MAA was one of the original signatories to the Internet Agreement, and it agreed to two extensions of it running through March 31, 2005. (A. 17, 25; 229-30, 337-40, 519-20, stip. 8.) While the Internet Agreement states that it is “experimental,”³ it imposes certain obligations on signatory employers after its expiration. Thus, it expressly bars signatory employers from future commercial internet “use” or “recording” unless the parties have agreed to an extension or a new agreement. (A. 17, 25; 220, art. 3(b).)

Like the AV Agreements, the Internet Agreement references the relationship between the AFM and its locals, and marks the division of bargaining between them on national and local matters. Thus, the Internet Agreement states that it applies to musicians subject to a “Local CBA” between an orchestra and an AFM local (such as Local 4). (A. 17, 25; 219, art. 1.) It further provides that the AFM shall ensure “that its Locals and members engaged in activities under the Agreement shall do nothing in derogation of the terms and intent of the Agreement.” (*Id.*) Finally, in an article entitled “Relationship between the Agreement and Local CBA,” it declares that no Local CBA may include “less

³ This was so because the Internet was a new medium that had not yet been exploited to any great degree by orchestras, and the Internet Agreement was to be used as a basis to gain experience for negotiating a more comprehensive successor agreement. (A. 17, 25; 53-54.)

favorable” provisions relating to the activities covered by the Agreement, and that any such provisions shall be “null and void.” (A. 228, art. 12(a).)

c. The MAA adopts the AFM’s 2006-2009 Live Recording Agreement, which recognizes the AFM as the bargaining representative for the specified recording activities

The Live Recording Agreement, effective July 14, 2006 to July 13, 2009, covers the production of hard copies, such as CDs, of recordings of live performances.⁴ It also covers digital downloads of live performances when the performance is also made available in a hardcopy form. (A. 18, 21-22; 50, 55-56, 231-42.) The Agreement was negotiated by the AFM and the MMC at a time when MAA Executive Director Hanson served as the MMC’s bargaining-committee chairperson. (A. 18; 142-43.) The MAA adopted this Agreement per its January 27, 2007 letter, which states that the MAA “understands and voluntarily adopts . . . each” of the Agreement’s provisions. (A. 18, 25; 341.) The Agreement provides that the signatory employer recognizes the AFM as the exclusive-

⁴ Before this Agreement, the AFM, beginning in the 1990s, negotiated individually with orchestras for “Radio to Non-commercial Agreements,” which pertained to CD recordings of certain historic broadcasts. (A. 16, 24; 62-64.) The MAA entered into two such agreements with the AFM: the 2001 “Von Dohnanyi Retrospective” covering 28 works performed between 1984 and 2001 and setting the compensation of musicians per the AFM “Phonograph Record” rate (A. 16, 24; 570-73), and the 2003 “Robert Shaw Tribute” with similar provisions pertaining to four works performed between 1960 and 1995. (A. 16, 24; 514-18.)

bargaining representative of musicians employed by the employer in the “creation of live audio recording products covered by the agreement.” (A. 18; 231, art. 3.)

The Live Recording Agreement also states that it is an “experimental” agreement. While MAA Executive Director Hanson claimed that the Agreement thus imposed no obligations on the MAA after it expired, he acknowledged that the MAA still applies the Agreement’s terms. (A. 18, 25; 148, 231.) Thus, in February 2010, the MAA notified its musicians that they would be paid for recent projects pursuant to the Agreement. (A. 21; 342, 521, stip. 27.)

3. The Foregoing Contracts and the AFM’s By-Laws Were Part of an Industry Practice of Dividing Representation between the AFM and its Affiliated Locals

As the foregoing shows, the MAA had a decades-long practice of recognizing and bargaining with the AFM as its musicians’ bargaining representative for the media-related issues covered by the MAA’s agreements with the AFM. Moreover, this practice was consistent with an industry pattern among orchestras across the country of engaging in national negotiations with the AFM and local negotiations with the affiliated AFM local, which was reflected in the AFM’s by-laws. (A. 16-17, 21-22, 26; 42-43, 58-61, 68, 77-78, 420-21, art. 15, sections 1(a) and 6(b).)

William Foster, a musician in the National Symphony Orchestra in Washington, D.C., serves as the Chair of the Electronic Media Committee for the

International Conference of Symphony and Opera Musicians, an AFM conference made up of the 50 orchestras with the largest budgets in the United States. (A. 16; 38-39.) In this capacity, he served on the AFM's bargaining committee and helped negotiate the AV, Internet, and Live Recording Agreements. (A. 16-17, 21-22; 39-41.) Foster explained that these contracts were part of an industry practice of dividing representation between the AFM and its affiliated locals, whereby musicians are represented by their local union regarding live performances and the preparation for such performances, and are represented by the AFM when they are "performing electronic media services or if electronic media is being produced from the live services that are covered by their local Agreement." (A. 21-22; 42-43.)

Likewise, Local 4 President Leonard Di Cosimo, who had bargained with the MAA over local agreements since 2005, explained that AFM affiliate Local 4 handles matters covered by the local Trade Agreements and the AFM handles "all the working and economic conditions that are in the [AFM's] Media Agreements." (A. 19-20; 82, 85-86, 93-94.) Accordingly, when Di Cosimo negotiates local agreements with the MAA, he maintains this division of representation between Local 4 and the AFM. (A. 19; 86, 89-91, 93-94.) Thus, when the MAA has sought to bargain with Local 4 over national media issues, he has declined and reminded

the MAA that the AFM, and not Local 4, is the musicians' recognized bargaining representative for such matters. (A. 19; 89-91, 93-94, 521, stip. 19, 26.)

Accordingly, the local and national agreements refer to each other and mark this division of representation. Local 4's agreements state that the AFM's by-laws (A. 343) shall apply to "all commercial recordings." (A. 16, 27; 294, art.13.4.) The AFM's by-laws allow AFM locals to bargain over media issues only with AFM approval: thus, they require that electronic-media work must be covered by either an agreement with the AFM or an agreement approved by the AFM. (A. 21-22, 27; 42-46, 68-69, 91, 417, art. 14, section 4(b), 420-21, art. 15, sections 1(a) and 6(b).) Moreover, those by-laws acknowledge the joint representation of employees by the AFM and its local unions. Thus, they state that its member employees authorize both the AFM and its locals to "act as their exclusive bargaining representative." (A. 369, art. 5, section 27(a).) The parties understood that the limited media provisions in the local agreements apply to certain local broadcasts and the distribution of them on the Internet. (A. 19, 21-22; 94-97, 103.) In turn, the AFM's agreements generally recognize that local media is covered in local agreements, and assume that there is a local contract in place covering the musicians engaged in producing electronic media. (A. 16-17, 21-22, 27; 173, art. I.A.2, 219, art. 1.)

4. From 2007 to 2009, the MAA Continues to Bargain with the AFM over National Media Issues When It Participates in Negotiations for an Integrated Media Agreement To Replace the AV, Internet, and Live Recording Agreements

The MAA continued to recognize and bargain with the AFM over national media issues from November 2007 through May 2009. During this time, it participated in negotiations for a new Integrated Media Agreement that would replace the separate AV, Internet, and Live Recording Agreements and combine them into one agreement covering all national media issues. (A. 19; 462, 520, stip. 13.) The MAA and the other employers involved bargained on a multi-employer basis through the MMC, which, as noted, was then chaired by MAA Executive Director Hanson. In May 2009, however, the negotiations broke down without the parties reaching an agreement. (A. 19; 520, stip. 15-16.)

C. In September 2009, After Decades of Recognizing and Bargaining with the AFM as Its Employees' Representative for National Media Issues, the MAA States that It Will Only Bargain with Local 4 Regarding those Issues and Refuses to Bargain with the AFM

On June 1, 2009, the MAA and Local 4 began negotiations for a successor to their 2006-2009 Trade Agreement, which was set to expire on August 30. At the outset, the MAA made a comprehensive proposal on electronic media that included national electronic-media matters that had previously been covered by the AV, Internet, and Live Recording Agreements, and which the MAA had just addressed in failed negotiations with the AFM for an Integrated Media Agreement. (A. 19;

520-21, stip. 17-18.) Local 4 refused and reminded the MAA that the AFM was the recognized bargaining representative on such media issues. (A. 19; 521, stip. 19.)

In August and September of 2009, the MAA sent letters to the AFM that it had withdrawn from multi-employer bargaining, and would only bargain with Local 4 over all electronic media matters. (A. 20, 26; 326, 329, 333, 521, stip. 20-25.) Despite its prior recognition of AFM as the bargaining representative for such matters, in a September 9, 2009 letter, the MAA now claimed that Local 4, not AFM, was the sole bargaining representative of its musicians, and insisted that its musicians could only have one “exclusive” bargaining representative. (A. 20, 26; 333.) Accordingly, the MAA expressly stated in its September 9 letter that it “has no desire or interest in bargaining with [the AFM], and it declines to do so.” (*Id.*)

The MAA thereafter permitted the AFM to participate in some negotiations, but only recognized it as Local 4’s representative, not the musicians’. (A. 20, 26; 521, stip. 26.) In response, the AFM and Local 4 repeatedly reminded the MAA that it had recognized the AFM as the musicians’ bargaining representative on national-media issues, and that, accordingly, the MAA was obligated to bargain with the AFM as to those issues. (A. 20-21, 26-27; 89-91, 327, 331, 334, stip. 26.) In January 2010, the MAA and Local 4 renewed and modified their Trade

Agreement effective August 31, 2009 to September 2, 2012, but without addressing the national media issues subject to the AFM's bargaining authority.

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman, and Members Pearce and Hayes) found, in agreement with the administrative law judge, that the MAA violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by withdrawing recognition from, and refusing to bargain with, the AFM as its employees' joint-bargaining representative for media-related matters covered by the MAA's collective-bargaining agreements with the AFM. (A. 15, 30.) The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). (A. 30.) Affirmatively, the Order requires the MAA to recognize and, on request, bargain in good faith with the AFM as the joint-bargaining representative of the MAA's musicians pertaining to issues covered by the AFM's AV, Internet, and Live Recording agreements, such as the production and use or development of electronic media including CDs, DVDs, digital recording, and the Internet. (*Id.*)

STANDARD OF REVIEW

The Court “applies the familiar substantial evidence test to the Board’s findings of fact and application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the [C]ourt might have reached a different conclusion *de novo*.” *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted). Under that test, the Board’s findings are “conclusive” if they are supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Further, the Board’s assessment of witness credibility is given great deference and must be adopted unless it is “hopelessly incredible” or “self-contradictory.” *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 953 (D.C. Cir. 1988). The Court also will “abide [the Board’s] interpretation of the Act if it is reasonable and consistent with controlling precedent.” *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002). *Accord Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996). Therefore, the Court’s review of the Board’s findings “is quite narrow.” *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000).

SUMMARY OF ARGUMENT

An employer may recognize two or more unions as its employees' joint-collective-bargaining representative and, if it does so, it violates Section 8(a)(5) and (1) of the Act by refusing to bargain with any such representative. The Board reasonably found that the MAA had recognized the AFM and Local 4 as joint-bargaining representatives for the issues covered by their respective agreements. The Board's finding is based on substantial record evidence that includes the parties' extensive bargaining history over the past almost 30 years, the recognition clauses in the MAA's agreements with the AFM and Local 4, the contractual language in those agreements which reference each other's bargaining parameters, the AFM's by-laws, and the long-standing industry practice. Thus, when the MAA admittedly withdrew recognition from, and refused to bargain with, the AFM, it violated the Act.

The MAA's recognition of Local 4 is embodied in a series of agreements tracing back to 1967, which covered the musicians' terms and conditions of employment regarding live performances, rehearsals for live performances, and certain local media matters. These local Trade Agreements acknowledged the AFM's authority over certain media matters and referred to the AFM's by-laws. Beginning in 1982, the MAA entered into a series of three national media agreements with the AFM which address the production and use or development of

electronic media. In two of these agreements, the MAA explicitly recognized the AFM as the bargaining representative for the media-related matters covered therein. Moreover, both the local and national agreements contained language marking the division of bargaining authority between the AFM and Local 4 relating to national and local media issues. This bargaining pattern followed an industry-wide practice among orchestras for conducting national negotiations with the AFM, and local negotiations with its affiliated locals. Accordingly, the Board concluded that the three parties here—the MAA, the AFM, and Local 4—were “keenly aware” of the division of representation they had developed and adhered to for decades.

However, in 2009, after national negotiations with the AFM failed to yield a new agreement to the MAA’s liking, it decided to change tactics and sought to bargain with Local 4 on matters that it had previously addressed in contracts and negotiations with the AFM. When the AFM and Local 4 both reminded the MAA of its obligation to bargain with the AFM as the musicians’ designated representative for such issues, the MAA explicitly withdrew recognition from, and refused to bargain with, the AFM. Its refusal and withdrawal was unlawful. Accordingly, the Board ordered the MAA to, on request, bargain with the AFM as the musicians’ joint-bargaining representative for the media-related matters covered by its agreements with the AFM.

In response, the MAA offers nothing that warrants disturbing the Board's reasonable findings and Order. First, it misquotes the Board's Order to argue that it somehow requires the MAA to bargain with two unions acting as separate and dueling "exclusive" bargaining representatives, when, of course, the Board explicitly found that the AFM and Local 4 were working together as joint-bargaining representatives. It then relies on this mischaracterization to allege that the Board's Order is contrary to the Act. However, this claim is belied by over five decades of law holding that two unions may appropriately bargain as joint representatives.

Second, the MAA hyperbolically claims that the Board's Order is "unprecedented" and requires a "bizarre new world" of bargaining. This claim is contradicted by decades of precedent approving joint-union bargaining. In the same vein, it argues that the good-faith bargaining the Board ordered is "unworkable," which is belied by nearly three decades of successful bargaining among the MAA, the AFM, and Local 4.

Third, the MAA claims that it only bargained with the AFM acting as the agent of Local 4, and not as its employees' joint-bargaining representative. The record evidence, however, includes the many agreements the MAA reached with the AFM, two of which expressly recognize the AFM as bargaining representative for the media-related subjects covered therein.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE MAA VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY WITHDRAWING RECOGNITION FROM, AND REFUSING TO BARGAIN WITH, THE AFM AS ITS EMPLOYEES’ JOINT COLLECTIVE-BARGAINING REPRESENTATIVE FOR THE MEDIA-RELATED ISSUES COVERED BY ITS COLLECTIVE-BARGAINING AGREEMENTS WITH THE AFM

A. An Employer May Recognize Two or More Unions as Its Employees’ Joint Collective-Bargaining Representative, and, if It Does So, It Violates Section 8(a)(5) and (1) of the Act By Refusing To Bargain with One of Those Unions

Section 8(a)(5) and (d) of the Act (29 U.S.C. § 158(a)(5) and (d)) make it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a) [of the Act (29 U.S.C. § 159(a))].”⁵ Under Section 9(a), a union may attain representational status through either Board certification or voluntary recognition by an employer; the duty to bargain exists either way.⁶ *See Exxel/Atmos, Inc. v. NLRB*, 28 F.3d

⁵ Moreover, Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their statutory rights. A violation of Section 8(a)(5) results in a “derivative” violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

⁶ Section 9(a) (29 U.S.C. § 159(a)) provides in relevant part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the

1243, 1246 (D.C. Cir. 1994); *NLRB v. Creative Food Design, Ltd.*, 852 F.2d 1295, 1297 (D.C. Cir. 1988). The legitimacy of the recognition can only be challenged if a proper charge is filed within the Act's statute of limitations period, which is fixed under Section 10(b) of the Act (29 U.S.C. § 160(b)) at 6 months from the time recognition was extended. *Local Lodge No. 1424, Int'l Assn. of 30 Machinists, AFL-CIO (Bryan Mfg.) v. NLRB*, 362 U.S. 411, 412, 416-17, 419 (1960).

Over five decades of settled law holds that an employer may recognize two or more unions as the joint collective-bargaining representatives of its employees. *See NLRB v. Nat'l Truck Rental Co.*, 239 F.2d 422, 425 (D.C. Cir. 1956) (approving the Board's long-time rule that two or more unions may appropriately bargain as joint-bargaining representatives); *accord Ozanne Constr. Co.*, 317 NLRB 396, 397-98 (1995), *enforced* 112 F.3d 219, 220, 224 (6th Cir. 1997); *CBS Broad., Inc.*, 343 NLRB 871, 872 (2004); *Tree-Free Fiber Co.*, 328 NLRB 389, 393 n.4 (1999). Accordingly, an employer violates Section 8(a)(5) and (1) of the Act by refusing to bargain with a union that it has recognized as its employees' joint-bargaining representative. *R.C. Aluminum Indus., Inc. v. NLRB*, 326 F.3d 235, 241-43 (D.C. Cir. 2003) (employer unlawfully refused to bargain with two

employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

unions that were the joint-bargaining representative of two units of its employees); accord *Ozanne Constr. Co.*, 112 F.3d at 220, 224; *NLRB v. Mead Foods, Inc.*, 353 F.2d 87, 87 (5th Cir. 1965) (per curiam); *CBS*, 343 NLRB at 872.

The Board's determination of whether an employer has recognized two or more unions as its employees' joint-bargaining representatives is informed by the parties' bargaining history and contractual language, including union-recognition clauses. See *Tree-Free Fiber Co.*, 328 NLRB at 393 n.3 (concluding that the parties' bargaining history, including negotiation and administration of contracts, demonstrated their long-standing practice of having the local and international unions act as joint-bargaining representatives, even where the CBA recognized the local union as exclusive bargaining representative); accord *Reynolds Metal Co.*, 310 NLRB 995, 995 n.3, 999 (1993); *Vermont Marble Co.*, 301 NLRB 103, 106 (1991); *CBS*, 343 NLRB at 872.

Moreover, joint bargaining is not inappropriate merely because it does not fit a conventional mold, or the parties have not always used the exact phrase "joint-bargaining representative." See *Tree-Free Fiber Co.*, 328 NLRB at 393 n.3. Rather, the issue is whether the parties have, given their particular needs and "the reality of [their] relationship," established a "workable pattern of bargaining" (*Radio Corp. of America*, 135 NLRB 980, 983 (1962)) that is "consistent with the

spirit of the Act.” *General Elec. Co.*, 150 NLRB 192, 206-07 (1964), *enforced* 418 F.2d 736 (2d Cir. 1969).

Accordingly, the Board has approved as “workable” various patterns of bargaining in which two unions act as joint-bargaining representative, including those developed “to accommodate the interest of local and national bargaining.” *Radio Corp. of America*, 135 NLRB at 983; *accord Reynolds Metal*, 310 NLRB at 995 n.3, 999 (parties established workable pattern of bargaining whereby employer bargained with parent union over national issues, and local union over local issues); *M&M Trans. Co., Inc.*, 329 NLRB 73, 73 n.1, 76 (1978) (same). It has also approved bargaining relationships whereby the parties divided bargaining authority among joint representatives. *See, e.g., Ozanne Constr. Co.*, 317 NLRB at 397-98 (each of two joint-representative unions represented different classifications of employees within the same unit); *CBS*, 343 NLRB at 872 (two unions jointly represented a nationwide unit of writers, with each covering employees in half of the country). The Board is justifiably skeptical of an employer’s claim that the pattern of joint bargaining that it has long made work is suddenly unworkable, particularly when based on speculation about conflicts or problems that may arise during future bargaining. *See General Elec. Co.*, 150 NLRB at 206 (holding that the employer, having recognized and bargained with the international union as bargaining representative of its employees, and having

entered into national negotiations on that basis, “is in no position . . . to question the representative status of” that union); *Ozanne Constr. Co.*, 112 F.3d at 219-20, 224 (agreeing with the Board that alleged rift between two unions and fact they may have had “different agendas” did not justify employer’s failure to bargain). *See generally Mead Foods*, 353 F.2d at 87 (holding that “asserted practical difficulties which may arise from having to bargain with two locals rather than one” did not justify refusal to bargain).

B. Substantial Evidence Supports the Board’s Finding that the MAA Violated Section 8(a)(5) and (1) of the Act by Withdrawing Recognition From, and Refusing To Bargain With, the AFM as Its Employees’ Joint Collective-Bargaining Representative

Applying the foregoing principles, the Board found (A. 27) that the three parties’ “history of bargaining, the recognition provisions in the AFM’s agreements, the industry practice, the AFM’s by-laws, and the language in Local 4’s Trade Agreement relating to the AFM” show that the MAA has recognized Local 4 and the AFM as its employees’ joint representatives. Accordingly, the Board concluded (A. 28, 30) that the MAA violated Section 8(a)(5) and (1) of the Act when it admittedly withdrew recognition from, and refused to bargain with, the AFM after September 9, 2009. The Board’s findings should be affirmed because they are supported by substantial evidence and settled law (*see* A. 23-24 and cases cited above at pp. 23-25) holding that these factors support finding that an employer had recognized two unions as its employees’ joint-bargaining

representative.

The parties' contracts, the recognition clauses in those contracts, and the negotiations leading to those contracts, all confirm that the MAA had recognized the AFM as its employees' joint-bargaining representative with Local 4. As the Board found (A. 16-18, 27, 30; *see* pp. 4-5, above), the MAA's recognition of Local 4 has been embodied since 1967 in series of local CBAs that addressed the musicians' terms and conditions of employment regarding live performances, rehearsals for live performances, and local television and radio broadcasts. Moreover, those local contracts also acknowledged the AFM's authority over certain media-related terms of employment for the musicians. (A. 16, 24; p. 5, above.) Additionally, from at least 1982 through 2009, the MAA, either individually or through multiemployer bargaining, engaged in negotiations with the AFM pertaining to national media matters. This bargaining resulted in the MAA signing three separate national-media agreements with the AFM—the AV, Live Recording, and Internet Agreements. (A. 16-18, 24, 27; pp. 6-12, above.) In two of these agreements—the 2006 AV Agreement and the 2007 Live Recording Agreement—the MAA explicitly recognized the AFM as the exclusive representative of its musicians for the media matters covered by those agreements. (*Id.*) As signatory to these agreements, the “MAA was historically a participant in this bifurcation of areas of negotiation.” (A. 26.) Accordingly, as the Board

reasonably observed (A. 28), the parties to these agreements—the MAA, Local 4, and the AFM—were all “quite sophisticated” and “keenly aware” that they had effectuated “a division of representation between the AFM and Local 4 relating to national and local media issues.”

The Board’s conclusion is buttressed by how the national and local agreements each mark this division of representation. (A. 16-18, 24, 27; pp. 5, 7, 10, above.) Thus, the AFM’s national agreements included references to the local CBAs and made them a condition precedent for the application of the national agreements to the MAA’s employees. (A. 16-18, 24, 27; pp. 7, 10, above.) Likewise, Local 4’s Trade Agreements with the MAA included deferential language to the AFM’s by-laws on particular media matters. (A. 16, 24, 27; p. 5, above.) This “evidence clearly reveals that the two unions served as joint representatives, as they acknowledged the scope of each other’s negotiation parameters and included references to the other union in their respective collective-bargaining agreements.” (A. 28.)

Further, these agreements and by-laws were part of an industry-wide pattern of bargaining with the AFM, in which the parties separated out national media issues to be covered by the AFM agreements and local issues to be covered by the local CBAs. (A. 19-22, 24, 27; pp. 12-14, above.) Thus, there can be no doubt that the MAA “was aware that Local 4 and the AFM had by agreement declared

certain matters for local negotiations with Local 4, and other matters for national negotiations with the AFM.” (A. 26.) That the MAA participated in such bargaining for over 25 years shows that the parties had established a “workable” pattern of bargaining with the two unions acting as joint representative. *See Radio Corp. of America*, 135 NLRB 980, 983 (1962) (parties developed “workable” pattern of bargaining “to accommodate the interest of local and national bargaining”); *Reynolds Metal*, 310 NLRB 995, 995 n.3, 999 (1993) (workable pattern of bargaining with parent union over national issues, and local union over local issues); *accord General Elec. Co.*, 150 NLRB 192, 206-07 (1964), *enforced* 418 F.2d 736 (2d Cir. 1969); *M&M Trans. Co., Inc.*, 329 NLRB 73, 73 n.1, 76 (1978).

Indeed, the MAA confirmed as much when it participated in negotiations with the AFM for an Integrated Media Agreement from November 2007 through May 9, 2009. (A. 19; p. 15, above.) It was only after those negotiations broke down that the MAA “took another tact” (A. 26) and presented proposals to Local 4 covering media issues related to matters that had heretofore been covered by the AFM’s national media agreements. Accordingly, the Board reasonably concluded (A. 28) that the “MAA’s leadership, after participating in failed national negotiations along with other orchestras with the AFM, sought to get a better deal than it thought it could get from the AFM by shifting those negotiations to a local

basis with Local 4.” Yet, even after Local 4 and the AFM steadfastly reminded the MAA that those matters were within the AFM’s purview, the MAA explicitly refused to bargain with or recognize the AFM as the joint-bargaining representative of its musicians. (A. 20-21, 26-27; pp. 16-17, above.)

The MAA’s tactics mirror those found unlawful in *General Elec. Co.*, 150 NLRB at 206-07. There, the employer and international union—much like the MAA and AFM here—had, “by mutual acquiescence, . . . historically engaged in bargaining on national issues,” while “reserve[ing] certain subjects for negotiation at a local level” with the affiliated locals. *Id.* at 205. Further echoing the instant case, the employer and the international reached several agreements based on this approach over a 10-year period, with “no indication of any desire to depart from the national method of bargaining.” *Id.* Yet, once national negotiations broke down, the employer sought, as did the MAA here, to get a better deal by bargaining instead with local unions on matters it had historically delegated to national negotiations. In determining the employer’s obligations, the Board began, just as it did here, with the settled principle that parties may establish “a workable pattern of bargaining” which “seeks to accommodate the interest of local and national bargaining.” *Id.* (quoting *Radio Corp. of Am.*, 135 NLRB at 983). Then, in findings that also track the MAA’s actions, the Board stated that the employer, having long recognized the international as bargaining representative for “matters

historically delegated to national negotiations,” was in “no position in this proceeding to question the representative status of [that union].” *Id.* at 206.

Indeed, if anything, such a finding is even clearer here where, for nearly three decades, the MAA and the AFM entered into and applied a series of agreements on national media issues, two of which explicitly recognized the AFM as the bargaining representative for the matters covered by the agreements.

In sum, the Board reasonably found that the MAA had recognized Local 4 and the AFM as joint representatives of its employees, with each union responsible for the terms and conditions covered by its respective agreements. Accordingly, the Board properly concluded (A. 28, 30) that the MAA violated Section 8(a)(5) and (1) of the Act by its admitted September 9, 2009 refusal to bargain with, and withdrawal of recognition from, the AFM “pertaining to media issues for which it had theretofore bargained with that union.”

C. The MAA Points to Nothing that Warrants Disturbing the Board’s Reasonable Findings

Given the applicable standard of review (*see* p. 18), the MAA faces an uphill battle in asking this Court to overturn the Board’s finding that it had recognized the AFM as its employees’ joint-bargaining representative. It cannot succeed merely by offering an alternative view of the parties’ bargaining history; rather, it must show that the Board’s view is unreasonable or unsupported by substantial evidence. The MAA makes three main arguments, none of which even comes

close to passing muster.

1. The Board Did Not Order the MAA to Bargain with Two Unions Acting as Dueling “Exclusive” Bargaining Representatives

First, the MAA repeatedly mischaracterizes (Br. 21-30, 53-55) the Board’s Order as requiring the MAA to bargain with two unions acting as two competing “exclusive” bargaining representatives. To the contrary, the Board found (A. 28-29) that the MAA was “keenly aware” that the AFM and Local 4 “were working together as joint representatives.” Accordingly, the Board ordered (A. 30) the MAA to resume recognizing and bargaining with the AFM as joint-bargaining representative with Local 4, along well-established lines of responsibilities, just as it had effectively done for the nearly 30 years preceding its unlawful withdrawal of recognition and refusal to bargain. Thus, it is factually inaccurate and highly disingenuous for the MAA to claim (Br. 24) that, as a result of the Order, “[p]ermanent recognitional rights are stripped from one union [Local 4] and given to another [AFM].”

Undeterred, the MAA relies on this same mischaracterization (Br. 22-30, 53-55)—that the Board mandated bargaining with dueling “exclusive” representatives—in alleging that the Order contravenes Section 9(a) of the Act. The MAA acknowledges (Br. 26) that Section 9(a) refers to unions “in the plural form”—i.e., it states that the “[r]epresentatives designated or selected for the

purposes of collective bargaining . . . shall be the exclusive representative.” It claims (*id.*), however, that this “means that each bargaining unit shall have only one exclusive bargaining representative,” and cites the Supreme Court’s decision in *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944) to this effect.

Nothing in *Medo Photo*, however, even addresses the propriety of two unions acting as joint-bargaining representatives. Rather, *Medo Photo* held that an employer violated the Section 8(a)(5) and (1) of the Act by dealing directly with its employees instead of bargaining with the one union recognized as the employees’ bargaining representative. *Medo Photo*, 321 U.S. at 684-86. It was in this context that the Supreme Court stated that the employer must deal with the employees’ exclusive bargaining representative and “no other.” *Medo Photo*, 321 U.S. at 684. *Medo Photo* does not bar two or more unions from acting jointly as such a representative, a practice which the Board and the courts have sanctioned for over 50 years. Thus, as the Board reasonably observed (A. 29) in distinguishing *Medo Photo*: “this is not a case where the MAA seeks to select between competing unions, or is engaging in direct dealing with employees. In this instance an international and local union are working together as joint representatives. Combined they are the exclusive bargaining representative of employees and this practice has been condoned by the Board.”

Equally misplaced is the MAA’s reliance (Br. 41) on *Oakwood Care Center*,

343 NLRB 659 (2004), which, like *Medo Photo*, did not address the issue of two unions acting as joint-bargaining representative. Rather, as the Board explained (A. 29), that case addressed the appropriateness of a unit comprised of solely and jointly employed employees, which would require different employers to bargain together regarding employees in the same unit. *See* 343 NLRB at 659, 663. The Board held in *Oakwood* that such combined multi-employer units are permissible only with the parties' consent. *Id.* And, as the Board explained here (A. 29), the problem raised by that different context—namely, that it creates a bargaining unit in which neither employer controls all terms and conditions of employment of the unit employees, and thereby subjects employees to fragmented and inherently conflicting interest, 343 NLRB at 663—does not apply here where there is only one employer who controls all the terms and conditions of the unit employees. Thus, contrary to the MAA (Br. 41), *Oakwood* certainly does not “recognize” that the bifurcation of bargaining topics among two unions acting as joint representative “undermines collective bargaining and is contrary to [the Act].”

The MAA also mistakenly relies (Br. 53) on *Newell Porcelain Co.*, 307 NLRB 877 (1992), *enforced sub nom. United Electrical Workers v. NLRB*, 986 F.2d 70 (4th Cir. 1993), which is easily distinguished. That case involved an employer that justifiably refused to bargain when faced with contradictory claims about the two unions' representative status: first the international union demanded

to bargain as the joint-bargaining representative with its local, and then falsely suggested that it had replaced the local as the sole bargaining representative. 986 F.2d at 72, 74-75. Moreover, this confusion was exacerbated by the absence of any prior bargaining history between the employer and the international union. *Id.* There was no such confusion here. The MAA had for decades recognized the AFM and Local 4 as joint-bargaining representatives, and the parties' bargaining consistently honored the well-established division of bargaining. Accordingly, when the MAA sought to have Local 4 replace the AFM as the bargaining representative for certain media issues, Local 4 explicitly declined and reminded the MAA that the AFM was the recognized representative for those issues.

Contrary to the MAA (Br. 20, 53, 55), it is not dispositive whether the AFM used the exact phrase "joint representative" when it demanded bargaining. As the Board observed (A. 29), this claim "raises form over substance." The extensive bargaining history between these sophisticated parties made it "clear that the two unions are working together as joint representative of the MAA's employees, and the MAA was informed of this when Local 4 officials repeatedly refused to bargain with the MAA over media issues within the AFM's province." (*Id.*) *See RC Aluminum Indus., Inc. v. NLRB*, 326 F.3d 235, 242-43 (D.C. Cir. 2003) (local unions made valid demand for joint bargaining, despite referring to themselves as sole representatives in demand letters, where later unfair labor practice charge

clarified locals' intent to bargain jointly, and employer nonetheless refused to bargain).

2. The Board's Order Is Not "Unprecedented" or "Unworkable"

Next, the MAA claims (Br. 23, 33) that the Board's Order is "unprecedented," and even requires a "bizarre new world" of bargaining. This hyperbolic claim flies in the face of five decades of legal precedent approving joint-union bargaining. The MAA further observes (Br. 27) that the division of bargaining raises different challenges than "conventional" joint bargaining in which two unions share the same representation rights over the same topics for the same employees. As just shown, however, the MAA cites no case barring the bifurcated bargaining relationship that it successfully lived with for nearly three decades. And rather than create "a whole new body of law," as the MAA wrongly suggests (Br. 28), the Board followed settled law which holds (*see* cases cited at pp. 24-25) that the parties may establish a "workable" pattern of bargaining based on their need for national and local negotiations.

Moreover, there is no factual support for the MAA's claim (Br. 28, 37, 44) that the division of bargaining at issue is "unworkable" for reasons ranging from alleged overlaps in the media provisions of the AFM's and Local 4's agreements, to a hypothetical "parade of horrors" regarding what might ensue if the MAA were to reach agreements with two unions containing conflicting no-strike clauses.

The Board explained (A. 29) why such claims are not credible. For over 25 years, the MAA, like many orchestras across the country, willingly recognized and bargained with the AFM over the national-media issues covered in the AFM's agreements, and with Local 4 over local issues such as live performances.

Accordingly, the MAA cannot credibly claim that the same division of bargaining that it successfully used for all those years is suddenly unworkable. *See General Elec. Co.*, 150 NLRB at 206 (employer that long recognized and bargained with the international union as bargaining representative of employees, and entered into national negotiations on that basis, "is in no position . . . to question the representative status of" that union).

For example, the MAA gains no ground in claiming (Br. 29) that future bargaining between the MAA, the AFM, and Local 4 *may* result in national and local agreements containing conflicting no-strike clauses. This claim is purely speculative. As the Board noted (A. 29), the MAA is not required to agree to any no-strike clause, but is only required to bargain in good faith with the AFM regarding certain media matters for which it has previously recognized the AFM as its musicians' bargaining representative. *See NLRB v. Mead Foods, Inc.*, 353 F.2d 87, 87 (5th Cir. 1965) (holding that "asserted practical difficulties which may arise" from having to bargain with two unions did not justify refusal to bargain). Moreover, as the Board further observed (A. 28), when it was in the MAA's

interest to do so, it entered into AFM agreements granting the AFM exclusive recognition pertaining to the media matters covered in those agreements, and those agreements contained union-security clauses. The MAA did so with full knowledge that its agreements with Local 4 also contained union-security clauses. In short, the MAA's long-term success with this workable bargaining arrangement undermines its claim that it cannot continue to work.

The MAA reverts to misstating the terms of the Boards Order, and ignoring its own bargaining history, when it claims (Br. 40) that “the media topic” cannot be “divided in the manner adopted by the [Board].” *See also* Br. 43 (claiming the Board divided the recognition obligation based “on the imprecise and ephemeral line imposed by the [judge]”). To the contrary, the *parties*, not the Board, “adopted” this method of bargaining whereby *they* divided up the “media topic.” The Board applied settled law in finding that they had chosen a “workable” approach.

The Company also errs when it cherry-picks certain contracts out of context and claims that they, alone, do not establish a workable pattern of bargaining. For example, it argues (Br. 24, 27) that the “one-time,” “experimental” Internet Agreement does not, by itself, establish a pattern of bargaining. The Court need not be detained by this claim where the Board, in fact, relied not on one experimental agreement, but on the multitude of contracts the MAA continually

signed over a more than 25-year period. The Internet Agreement was certainly part of this pattern of bargaining. Indeed, despite its being “experimental,” that agreement imposed certain obligations after its expiration and, accordingly, the MAA agreed to extend it twice.

The MAA likewise gains no ground with the so-called *Rusalka* “conflict” (Br. 18, 41) in which the MAA and the organizers of the Salzberg festival could not come to terms for the release of a CD of that performance. Contrary to the MAA, this involved no unworkable “conflict” between local and national media provisions. Rather, the MAA promptly applied the AFM’s Live Recording Agreement during those negotiations, thus confirming its awareness that this national agreement—which it had bargained, signed, and was still applying to its musicians—covered such activities. (A. 18, 27; 124-25.) It was only after the festival declined to pay the required amount that the MAA turned to the Trade Agreement. (A. 18, 27; 125-26.)

The MAA speculates (Br. 43) that Local 4 would somehow be better equipped to address technology, like the Internet, that is “changing at a frenetic pace.” However, the parties, including the MAA and other orchestras in the industry, decided that the AFM, with its national reach, deeper resources, and long experience with the changing technologies (from phonographs to AV to digital media), was better equipped to bargain over national media issues. Thus, the

digital economy created a national market for orchestral recordings, which could be best addressed by a national organization with expertise in those matters. (*See* A. 41-42, 161-63, 165.) Accordingly, while the MAA *now* complains that the Internet Agreement was born obsolete (Br. 43), it fails to explain how Local 4, lacking the same expertise, resources, and national reach, could have adapted more quickly to the technological changes at play. Moreover, the MAA's claims ring especially hollow given its decision to twice extend the Internet Agreement through 2005, and to continue bargaining with the AFM over media issues until 2009.

3. The MAA Did Not Bargain with the AFM Acting Merely as the Agent of Local 4

Finally, the MAA claims (Br. 46) that it entered into AFM agreements with the AFM acting as the agent of Local 4, not as its employees' joint-bargaining representative. The Board reasonably found (A. 28) that this claim was unsupported by record evidence. Indeed, it is flatly contradicted by the many agreements the MAA reached with the AFM, including the 2006 AV and 2007 Live Recording Agreements, which expressly recognize the AFM as bargaining representative. Even if the Court were to look past these unambiguous recognition

clauses, and there is no reason it should, the MAA provided no evidence that it signed these agreements with the AFM merely as Local 4's agent.⁷

The MAA fairs no better in claiming (Br. 50-51) that its obligation to bargain with the AFM as the recognized joint-bargaining representative was extinguished when it withdrew from multi-employer bargaining in 2009. It does not dispute (*id.*) the general rule that “the presumption of majority status flowing from the contract in a multi-employer unit survives a respondent employer’s timely withdrawal from that unit and carries over to the newly created single-employer unit.” A. 22-23 (citing *Holiday Hotel & Casino*, 228 NLRB 926, 928 (1977), *enforced* 604 F.2d 605, 606 (9th Cir. 1979); *Tahoe Nugget, Inc.*, 227 NLRB 357 (1976), *enforced* 584 F.3d 293, 302-04 (9th Cir. 1978)). Instead, it claims (Br. 51) that this settled rule is inapplicable because it had already recognized Local 4 by the time it began entering into a series of multi-employer agreements recognizing the AFM as exclusive-bargaining representative. The MAA, however, cites no case adopting this broad exception. Rather, it cites only *Chicago Magnesium*

⁷ It is irrelevant (Br. 8) whether the MAA signed the Live Recording Agreement pursuant to a separate agreement with Local 4 to do so. The AFM was not a party to, and was therefore not bound by, that side agreement. (A. 19, 25.) The Live Recording Agreement was between the MAA and the AFM, and nothing therein indicates that the AFM entered it as a representative of Local 4. Indeed, any such claim would conflict with the Agreement’s express recognition of the AFM as bargaining representative for the recording activities covered by the Agreement.

Castings, 256 NLRB 668 (1981), which neither addressed such an exception, nor considered an employer that, like the MAA here, had recognized a local and international union as joint-bargaining representative.

Moreover, such an exception, particularly in the circumstances of this case, would thwart the purpose of having the presumption in the first place—namely, promoting stability in collective bargaining. *See Tahoe Nugget*, 584 F.2d at 303. The Board properly rejected the MAA’s revisionist view of the parties’ bargaining relationship. Rather, as the Board found, the MAA was “keenly aware” (A. 28) that these two unions have been working together as joint-bargaining representative. As such, upholding the status of the one serves to confirm the status of the other.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the MAA's petition for review, and enforcing the Board's Order in full.

s/ JILL A. GRIFFIN

JILL A. GRIFFIN

Supervisory Attorney

s/ GREG P. LAURO

GREG P. LAURO

Attorney

National Labor Relations Board

1099 14th Street, NW

Washington, DC 20570

(202) 273-2949

(202) 273-2965

LAFE E. SOLOMON

Acting General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

January 2012

STATUTORY ADDENDUM

STATUTORY ADDENDUM

Sec. 7. [Sec. 157.] Employees shall have the right to self- organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [Section 158(a)(3) of this title].

Sec. 8(a). [Sec. 158(a).] [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [Section 157 of this title];

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [Section 159(a) of this title].

Sec. 9(a) [§ 159(a).] [Exclusive representatives; employees' adjustment of grievances directly with employer] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Sec. 10(a). [§ 160(a).] [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that

has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

Sec. 10(b). [**Sec. 160(b)**] [Complaint and notice of hearing; six-month limitation; answer; court rules of evidence inapplicable] Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six- month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code [section 2072 of title 28].

Sec. 10(e). [Sec. 160(e)] [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

10(f) [Sec. 160(f)] [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to

have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MUSICAL ARTS ASSOCIATION)
)
Petitioner)
) Nos. 11-1255 & 11-1276
v.)
)
NATIONAL LABOR RELATIONS BOARD) Board Case No.
) 8-CA-38834
)
Respondent)
)
AMERICAN FEDERATION OF MUSICIANS)
OF THE UNITED STATES AND CANADA,)
AFL-CIO)
)
Intervenor)

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 10th day of January 2012