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**Lancaster Symphony Orchestra and The Greater
Lancaster Federation of Musicians, Local 294,
AFM, AFL–CIO.** Case 04–CA–082327

August 21, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES
AND GRIFFIN

This is a refusal-to-bargain case in which the Respondent is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by the Union on June 4, 2012, the Acting General Counsel issued the complaint on June 19, 2012, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union’s request to bargain following the Union’s certification in case 04–RC–021311.¹ The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On July 6, 2012, the Acting General Counsel filed a Motion for Summary Judgment and Memorandum in Support of Motion. On July 10, 2012, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification on the grounds that the certified unit includes only independent contractors and not employees within the meaning of Section 2(3) of the Act.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

¹ 357 NLRB No. 152 (2011). Official notice is taken of the “record” in the representation proceeding as defined in the Board’s Rules and Regulations, Sections 102.68 and 102.69(g). See *Frontier Hotel*, 265 NLRB 343 (1982).

Accordingly, we grant the Motion for Summary Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has provided live musical performances and educational outreach programs in Lancaster, Pennsylvania.

During the 12-month preceding issuance of the complaint, the Respondent, in conducting its business operations described above, received gross revenues, excluding contributions unavailable for use for operating expenses, in excess of \$1 million, and purchased and received in excess of \$5000 directly from points outside the Commonwealth of Pennsylvania.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, The Greater Lancaster Federation of Musicians, Local 294, AFM, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held by mail ballot from February 15, 2012 through February 29, 2012, the Union was certified on March 13, 2012, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Included: All full-time and regular part-time musicians employed by Respondent (musicians who performed in at least one program in the prior season and at least one program in the current season, or those who performed in a total of at least three programs during those seasons).

Excluded: CEO, Music Director, Development Director, Artistic Administrator, Director of Education, Subscription Manager, office clerical employees, managers, guards and supervisors as defined in the Act.

² The Respondent’s request that the complaint be dismissed in its entirety is therefore denied.

Member Hayes dissented from the Board’s Decision on Review and Order in the underlying representation proceeding. He would have found that the musicians at issue are independent contractors and affirmed the Regional Director’s dismissal of the representation petition. While Member Hayes remains of that view, he agrees that the Respondent has not presented any new matters that are properly litigable in this unfair labor practice proceeding.

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

On about March 20, 2012, the Union, by letter, requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit. Since about March 20, 2012, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. We find that the Respondent's failure and refusal to recognize and bargain with the Union constitutes a violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about March 20, 2012, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Lancaster Symphony Orchestra, Lancaster, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with The Greater Lancaster Federation of Musicians, Local 294, AFM, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Included: All full-time and regular part-time musicians employed by Respondent (musicians who performed in at least one program in the prior season and at least one program in the current season, or those who performed in a total of at least three programs during those seasons).

Excluded: CEO, Music Director, Development Director, Artistic Administrator, Director of Education, Subscription Manager, office clerical employees, managers, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Lancaster, Pennsylvania, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.⁴ Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁴ For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

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by the Respondent at any time since on or about March 20, 2012.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 21, 2012

Mark Gaston Pearce, Chairman

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with The Greater Lancaster Federation of Musicians, Local 294, AFM, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following unit:

Included: All full-time and regular part-time musicians employed by us (musicians who performed in at least one program in the prior season and at least one program in the current season, or those who performed in a total of at least three programs during those seasons).

Excluded: CEO, Music Director, Development Director, Artistic Administrator, Director of Education, Subscription Manager, office clerical employees, managers, guards and supervisors as defined in the Act.

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