

**Nos. 14-1247 & 14-1272**

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

**LANCASTER SYMPHONY ORCHESTRA**  
Petitioner/Cross-Respondent

v.

**NATIONAL LABOR RELATIONS BOARD**  
Respondent/Cross-Petitioner

and

**THE GREATER LANCASTER FEDERATION OF MUSICIANS,  
LOCAL 294, AMERICAN FEDERATION OF MUSICIANS, AFL-CIO**  
Intervenor

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	4-CA-082327
	)	
and	)	
	)	
THE GREATER LANCASTER FEDERATION	)	
OF MUSICIANS, LOCAL 294, AMERICAN	)	
FEDERATION OF MUSICIANS, 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”) certifies the following:

**A. *Parties, Intervenors, and Amici:*** The Lancaster Symphony Orchestra (“the Orchestra”) is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. The Greater Lancaster Federation of Musicians, Local 294, American Federation of Musicians, AFL-CIO (“the Union”) moved to intervene on behalf of the Board. The Orchestra and the Union appeared before the Board in Case 4-RC-021311. The Orchestra and the Board’s General Counsel appeared before the Board in Case 4-CA-082327.

B. ***Ruling Under Review:*** The case involves the Orchestra's petition to review and the Board's cross-application for enforcement of a Decision and Order the Board issued on November 12, 2014, reported at 361 NLRB No. 101, as well as the Board's underlying Order in Case 4-RC-021311, issued on December 27, 2011.

C. ***Related Cases:*** The ruling under review has not previously been before this Court or any other court.

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Dated at Washington, DC  
this 11th day of May, 2015

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of the Lancaster Symphony Orchestra (“the Orchestra”) to review, and the cross-application of the National Labor Relations Board to enforce, an order of the Board. In its Order, the Board found that the Orchestra violated Section 8(a)(5) and (1) of the National Labor

Relations Act, as amended (29 U.S.C. §§ 151, 158 (a)(5) and (1)) (“the Act”), by failing and refusing to bargain with The Greater Lancaster Federation of Musicians, Local 294, American Federation of Musicians, AFL-CIO (“the Union”). The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Decision and Order issued on November 12, 2014, and is reported at 361 NLRB No. 101. (JA 256-57.)<sup>1</sup>

The Court has jurisdiction over these consolidated proceedings under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the Board’s Order is final. Section 10(f) of the Act (29 U.S.C. § 160(f)) provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) allows the Board to cross-apply for enforcement. The Orchestra filed a petition for review on November 17, 2014, and on December 9, the Board filed a cross-application for enforcement. Both were timely; the Act places no time limit on such filings. The Union has intervened in support of the Board’s cross-application.

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<sup>1</sup> “JA” references are to the parties’ Joint Appendix filed on April 27, 2015. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

The Board based its unfair-labor-practice order, in part, on findings made in the underlying representation (election) proceeding (Board Case No. 4-RC-21311). The record in that proceeding is therefore properly before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d) does not give the Court general authority over the representation proceeding, but authorizes review of the Board’s actions in the representation proceeding for the limited purpose of deciding whether to “enforc[e], modify[] or set[] aside in whole or in part the [unfair labor practice] order of the Board.” The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the ruling of the Court. *See, e.g., Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

### **STATEMENT OF THE ISSUE PRESENTED**

Whether substantial evidence supports the Board’s finding that the Orchestra violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the certified representative of the Orchestra’s musicians. That question turns on the subsidiary issue of whether the Board reasonably found that the musicians are statutory employees and not, as the Orchestra contends, independent contractors.

### **RELEVANT STATUTORY PROVISIONS**

All applicable statutes are contained in the Addendum attached to this brief.

## STATEMENT OF THE CASE

On August 21, 2012, a three-member panel of the Board (Chairman Pearce and Members Hayes and Griffin) found that the Orchestra violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing and refusing to meet and bargain with the Union, which the Board certified as the collective-bargaining representative of its musicians. *See Lancaster Symphony Orchestra*, 358 NLRB No. 45 (“the 2012 Decision and Order”). The Orchestra petitioned this Court for review of that Order, and the Board sought enforcement (D.C. Cir. Nos. 12-1371, 12-1384). On January 25, 2013, the Court placed the case in abeyance “upon consideration of the court’s opinion and judgment issued January 25, 2013, in No. 12-1115, et al. – *Noel Canning, a Division of the Noel Corporation v. NLRB.*”

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held three recess appointments to the Board in January 2012 invalid, including the appointment of Member Griffin. On October 21, 2014, the Court granted the Board’s motion to vacate the 2012 Decision and Order and remanded the case to the Board for further consideration in light of the Supreme Court’s decision in *Noel Canning*. On November 12, 2014, a properly constituted Board panel (Chairman Pearce and Members Hirozawa and Johnson) issued the Decision and Order (361 NLRB No. 101) now before the Court, which finds that the Orchestra violated Section 8(a)(5) and (1) of the Act by

refusing to bargain with the Union as the certified collective-bargaining representative of an appropriate unit. The Orchestra does not dispute that it refused to bargain; rather, it contests the Board's finding in the representation case that the musicians are employees covered by the Act. Relevant portions of the factual and procedural history of the case before the Board are set forth below, followed by a summary of the Board's Decision and Order.

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. Representation Proceeding**

#### **1. Procedural History**

The Orchestra operates a symphony orchestra in Lancaster, Pennsylvania. (JA 174-75.) On June 14, 2007, the Union filed a petition for an election among the full-time and regular part-time musicians. (JA 159.) The Orchestra contended that the musicians were independent contractors and therefore not employees under the Act. On June 25, 2007, the Board conducted a hearing to resolve the representation issues. Both parties presented testimony and documentary evidence.

The Board's Regional Director issued a Decision and Order finding that the musicians were not employees under the Act and, therefore, dismissed the Union's petition. (JA 208-17.) The Union requested review of the Regional Director's dismissal of its petition, which the Board (Chairman Battista and Members

Schaumber and Walsh) granted. On review, the Board (Chairman Pearce and Member Becker; Member Hayes dissenting) reversed the Regional Director, determining that the musicians are employees under Section 2(3) of the Act. (JA 243-52.) The Board then conducted an election among the musicians, which the Union won by a vote of 50 to 34, (JA 279), and certified the Union as the collective-bargaining representative of the Orchestra's musicians.

## **2. The Musicians' Relationship with the Orchestra**

### **a. The Orchestra sets the season's concerts and solicits and selects musicians**

The Orchestra provides live musical performances and educational outreach. (JA 243; JA 27.) With input from a board of directors, the Orchestra's music director, who is also the conductor, selects a theme for the concert season, which runs annually from October to May, and then chooses the music to bring "that concept [] forward." (JA 243; JA 32.) A regular series of classical concerts, each performed four times between Friday and Sunday, comprises a typical Orchestra season. (JA 243; JA 27.) Recently, the Orchestra has performed six series of concerts in a season. The Orchestra also performs other programs, such as holiday, summer, and children's concerts and an audience request program. (JA 243 JA 27.) For the 2006-2007 season, for instance, the Orchestra planned and put on 63 separate services, which included both rehearsals and concerts. (JA 176-84.)

In the spring, the Orchestra begins its process to staff the concert series. (JA 243; JA 33, 65.) A concert, on average, requires 65 musicians. (JA 209; JA 33.) The Orchestra sends information packets to 120 musicians who have regularly or recently performed with the Orchestra to determine their availability for and interest in the upcoming season. Half of the contacted musicians respond, and some musicians play for the Orchestra every year. At least three musicians have played for the Orchestra for over 30 years, including one musician who has played since the Orchestra began 59 years ago. (JA 243; JA 33-35, 86, 121-22.)

Once the musicians respond with their availability and requests for any specified programs or concerts, the Orchestra selects which musicians will perform in each program or concert. This process rarely fills all of the available positions; the Orchestra also contacts other musicians. (JA 245; JA 80-81, 83-84.) If a musician determines that she cannot fulfill a commitment, the Orchestra requests 4-6 weeks' notice to allow time to find a substitute. When a musician must cancel at the last minute, the Orchestra asks for the musician's help in securing a similarly skilled replacement. There are no repercussions if the musician is unable to find a replacement. (JA 244; JA 51.)

**b. The musicians must execute a one-year, non-negotiated agreement setting, among other things, the terms of compensation**

Musicians must sign the Orchestra's Musician Agreement Form contained in the information packet before participating in any program. Among other non-negotiated terms, the one-year agreement represents that the musician is an independent contractor and that payment will be a "fixed fee on a per-service basis." (JA 243; JA 176-84.) "A service is 2.5 hours, divided into ten 15-minute segments."<sup>2</sup> (JA 243; JA 198-202.) The musicians receive an additional fixed amount for each 15-minute increment beyond the initial 2.5 hours. Those musicians living outside the immediate Lancaster area receive a travel stipend and a meal allowance. Ticket sales do not affect the musicians' compensation. (JA 243; JA 176-84, 198-202, 43, 46, 99, 113-14.)

For tax purposes, the Orchestra does not treat the musicians as employees. It does not deduct payroll taxes and the musicians do not complete W-2 forms. Musicians do not receive vacation time; paid time off; life insurance; or health, retirement or pension benefits. (JA 243; JA 176-84, 46.) Notwithstanding these

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<sup>2</sup> There are two different rates per service, one for principal players and another, lower rate, for section players. A principal player leads a section, whereas a section player is a member of a section, such as the violin section. (JA 243; JA 67.)

factors or having signed the Musician Agreement Form, at least one long-serving musician considers himself to be an Orchestra employee. (JA 243; JA 133.)

**c. The Orchestra dictates all significant aspects of the rehearsals**

The music director controls the rehearsal in all significant respects, both in terms of logistics and content of the rehearsals. Specifically, with regard to the process, the music director is responsible for scheduling the number and length of rehearsals. The Orchestra requires all musicians performing in the program to attend the rehearsals. (JA 244; JA 176-84, 65.) Musicians must be “in their chairs, ready to go” at the rehearsal’s starting time (JA 244; JA 98), with their instruments properly tuned. (JA 244; JA 123). The personnel manager or music director may excuse a musician from one of the preliminary rehearsals, but a musician who misses the final rehearsal “will not be allowed to play the performances, except with the permission of the conductor.” (JA 244; JA 198-202, 176-84.) Further, the music director determines when breaks will be called during rehearsals. (JA 244; JA 98-99.)

In terms of content, the Orchestra establishes the order of the music for rehearsal, but the music director may deviate from that order as he sees fit. During rehearsals, musicians follow the instruction and lead of the music director in developing the final form of the performance. To this end, the music director alone determines how and when certain instrument sections “come in” during a

performance and how much time to spend on each piece. He also decides whether the entire orchestra or only certain instruments rehearse portions of the music. The music director is singularly responsible for determining the volume, pitch, and blend of the music and occasionally he varies from the printed music, consistent with his personal artistic vision.<sup>3</sup> The musicians must heed the music director's direction on all aspects of their performance.<sup>4</sup> (JA 244, 246, 212; JA 104-05, 124-29.)

**d. The Orchestra issues detailed rehearsal and performance guidelines governing musicians' conduct and retains the authority to discipline the musicians**

In addition to the control enjoyed by the music director, the Orchestra has established comprehensive, written rehearsal and performance guidelines for its musicians. These guidelines prohibit certain conduct, such as talking or practicing

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<sup>3</sup> One musician detailed the director's role as follows:

He'll start with the conception of the sound that he wants to hear. He'll say he wants a brighter sound, a darker sound, louder sound, softer sound, so he'll start off with that. In some cases, he'll even explain the technique that he wants them to use, which may be specific to that instrument, a particular bow technique or a vibrato technique, or he's a clarinet player so he may suggest to the clarinet section a particular clarinet-specific technique he would like them to use that may help them to produce the sound that he's looking for.

(JA 130.)

<sup>4</sup> On one occasion, the music director instructed the principal bassoon player literally to "put a sock in her bassoon." (JA 132.) She initially resisted, but "ultimately she did it at a later rehearsal." (JA 132.)

when the music director is on the podium and speaking during a performance or bows. (JA 244; JA 207.) They also proscribe crossing one's legs while playing or during a tacet and "react[ing] to mistakes." (JA 244; JA 207.) Additionally, the guidelines mandate certain conduct, such as "[m]aintain[ing] good playing posture" and an attentive appearance throughout the performance as well as quiet page turning. (JA 244; JA 207.) Lastly, the Orchestra guidelines demand that the musicians adhere to a dress code for concerts – black tuxedos with coat tails and a white tie for men and black formal attire, either a dress or slacks, for women. (JA 244; JA 203, 307, 50, 90.)

The Orchestra also has the authority to discipline musicians and has, in fact, done so at least once. (JA 244; JA 204-06, 91.) In 2007, the Orchestra issued a written reprimand to a musician for behavior during a rehearsal that was "inconsistent with the professional working environment [that the Orchestra] strive[s] to provide." (JA 244; JA 204-06.) The reprimand warned the musician that failure to correct the behavior could result in "suspension for an appropriate period of time." (JA 244; JA 204-06.)

**e. The musicians are highly skilled, provide certain of the instrumentalities necessary, and engage in other employment**

The musicians, who are highly skilled, receive the music in advance of the first rehearsal and must come to the first rehearsal fully versed in the music. (JA

243; JA 48-49, 131.) The amount of individual practice varies by musician. (JA 48-49, 131-32, 141.) One musician spent “almost no time practicing.” (JA 142.) The musicians are not compensated for their personal practice time. (JA 243; JA 48-49, 131.)

Generally, the musicians must provide their own instruments, strings, and dress attire. (JA 244; JA 49-50.) The Orchestra provides large instruments, such as the piano and certain percussion pieces, for rehearsals and performances. (JA 244; JA 95-96.) The Orchestra provides the venue (often times a leased concert hall), chairs, stands, and sheet music. (JA 244; JA 94-97.) The Orchestra allows musicians to perform for other musical entities at any time during the year. For example, one musician has played for the Orchestra for over 30 years and also plays for other orchestras in the area on a regular basis. (JA 244; JA 139-41.)

### **B. Unfair-Labor-Practice Proceeding**

After being certified, the Union requested that the Orchestra begin bargaining for an initial contract. The Orchestra refused, and the Union filed an unfair-labor-practice charge. After an investigation, the Regional Director, acting on behalf of the Board’s Acting General Counsel, issued a complaint alleging that the Orchestra’s refusal to bargain violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). The Orchestra filed an answer to the complaint, admitting its refusal to bargain, but challenging the validity of the Board’s

certification of the Union. The Acting General Counsel filed a motion seeking summary judgment, to which the Orchestra responded, claiming that the musicians are not employees.

## II. THE BOARD'S CONCLUSIONS AND ORDER

On November 12, 2014, the Board (Chairman Pearce, Members Hirozawa and Johnson) issued a Decision and Order finding that all issues raised by the Orchestra could have been litigated in the prior representation proceeding. (D&O 1.) The Board also found that the Orchestra did not offer to adduce at a hearing any newly discovered or previously unavailable evidence or allege any special circumstances that would require the Board to reconsider its decision in the underlying representation case. (JA 256.) The Board therefore found that the Orchestra violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by its undisputed failure to bargain with the Union as the exclusive representative of the unit employees.<sup>5</sup> (JA 257.)

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<sup>5</sup> As the Orchestra correctly notes (Br. 15 n.3), the Board, per its well-established practice in test-of-certification cases, properly did not analyze the employment status of the musicians and focused exclusively on the Orchestra's refusal to bargain. *See, e.g., Alois Box Co. v. NLRB*, 216 F.3d 69, 71-72 (D.C. Cir. 2000). To obtain judicial review of a certification, which is not a final order, an employer must refuse to bargain and then defend itself against the resulting unfair-labor-practice charge by challenging the certification. In the unfair-labor-practice proceeding before the Board, the Board analyzes the refusal to bargain strictly as an unfair labor practice and does not generally revisit or allow relitigation of the certification. *Id.*

The Board's Order requires the Orchestra to cease and desist from refusing to bargain with the Union, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (JA 257.) Affirmatively, the Board's Order requires the Orchestra to bargain with the Union on request, embodying any understanding in a signed agreement, and to post, and if appropriate to distribute electronically, copies of a remedial notice. (JA 257.)

### **SUMMARY OF ARGUMENT**

Substantial evidence supports the Board's finding that the Orchestra violated the Act by refusing to bargain with the Union as the certified representative of its musicians. The Orchestra argues that the musicians are independent contractors and, therefore, the Board should not have certified the Union. The Orchestra has failed to show that its musicians are not employees under the Act.

The Board properly followed longstanding precedent, which applies the multi-factored common-law agency test, to find that, on balance, the evidence failed to show that the musicians are independent contractors. These factors are: control over the manner and means of work, whether the employee is engaged in a distinct occupation, entrepreneurial risk of loss and opportunity for gain, which party supplies the tools and place of work, skill, the parties' belief regarding relationship created, whether the work is part of the employer's regular business,

whether the individual is in the business, method of payment, and length of time the individual is employed. The Orchestra maintains strict control over its musicians – from when they work to where they work; from how they play to how long they rehearse; from what music they play to how precisely they are to express the artistic vision of the music director; and from whether they cross their legs on stage to how they turn the music pages. There is no significant aspect of the means and manner of their work that is committed to their discretion. Additionally, the Orchestra sets the musicians' compensation, with no ability of the musicians to negotiate that pay or earn more should they play better. The only way a musician increases her wage is to play more concerts or, at the Orchestra's unilateral determination, to work beyond the initial 2.5-hour commitment. Further, there is a clear absence of any true entrepreneurial opportunity for the musicians to profit from their seat in the orchestra. The musicians have no proprietary interest in their seat, do not hire subordinates, cannot work faster to earn more pay, or do not bear any other hallmarks of independent contractor status.

The Orchestra's arguments to the contrary are unavailing. In the main, the Orchestra challenges the Board's determination as to the control and entrepreneurial opportunity factors. With respect to control, the Orchestra maintains that its control is limited to the end product. This claim is directly at odds with the bulk of the record evidence showing that the Orchestra and its music

director place far more constraints on the musicians than simply the end product. Further, the Board's detailed reasoning and careful consideration of all the factors unequivocally dispose of the Orchestra's suggestion that the Board erroneously emphasized control over the other agency factors. The Board's analysis simply tracks the weight of the record evidence. The Orchestra also cannot overcome the weight of the evidence of control on this record by arguing that the personal conduct guidelines, to which the musicians must adhere, amount to nothing more than the symphony's accepted business needs or that other musicians have a minimal role in the conduct of the rehearsals.

With respect to entrepreneurial opportunity, the Orchestra makes an untimely claim that the Board failed to accord greater weight to this prong. Because the Orchestra opted not to raise this claim before the Board in the representation case, as it must, this Court is without jurisdiction to hear it. In any event, neither this Court's nor the Board's precedent establishes that, in all cases, entrepreneurial control is paramount. Indeed, in *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968), the Supreme Court specifically instructed otherwise – that no factor is universally decisive. The Board's Order is entirely consistent with precedent and properly considers, and finds lacking, the relevant factors demonstrating entrepreneurial opportunity.

Lastly, the Orchestra's attempts to analogize this case to other cases involving independent contractors are unavailing. The cases are readily distinguishable on their record facts.

### **ARGUMENT**

Section 7 of the Act gives employees the right to choose a representative and to have that representative bargain with the employer on their behalf. 29 U.S.C. § 157. Employers have the corresponding duty to bargain with their employees' chosen representatives, and a refusal to bargain violates this duty under Section 8(a)(5) and (1) of the Act. 29 U.S.C. § 158(a)(5) and (1).<sup>6</sup> The Orchestra does not dispute that it refused to bargain with the Union. Rather, it challenges the validity of the Board's certification of the Union as the exclusive representative of a bargaining unit of its musicians on the ground that the musicians are independent contractors. Unless the Orchestra prevails in its challenge to the Board's certification of the Union, its admitted refusal to bargain violated Section 8(a)(5) and (1) of the Act, and the Board is entitled to enforcement of its order. *See Pearson Educ., Inc. v. NLRB*, 373 F.3d 127, 130 (D.C. Cir. 2004); *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 882 (D.C. Cir. 1988).

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<sup>6</sup> A violation of Section 8(a)(5) of the Act produces a "derivative" violation of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

**THE BOARD REASONABLY DETERMINED THAT THE ORCHESTRA’S MUSICIANS ARE EMPLOYEES WITHIN THE MEANING OF THE ACT, NOT INDEPENDENT CONTRACTORS, AND, THEREFORE, THE ORCHESTRA VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION**

**A. Applicable Principles and Standard of Review**

Section 2(3) of the Act (29 U.S.C. § 152(3)), as amended by the 1947 Labor Management Relations Act, provides, in pertinent part, that the term “employee” shall not include “any individual having the status of an independent contractor.” The Supreme Court reaffirmed an expansive interpretation of “employee” after Congress’ 1947 amendment of Section 2(3) to exclude supervisors, independent contractors, and others. *See Chem. Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166-68 (1971) (finding that “employee” broadly covers those who work for another). The Supreme Court later described the breadth of the Act’s definition of employee as “striking,” noting that its only limitations are those specific exemptions enumerated in the Act. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). “The Board’s broad, literal interpretation of the word ‘employee’ is consistent with several of the Act’s purposes, such as protecting the right of employees to organize for mutual aid without employer interference . . . and encouraging and protecting the collective-bargaining process.” *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 91 (1995) (case citations and internal quotations omitted). Accordingly, the Board narrowly interprets any exemptions, *see Boston*

*Med. Ctr. Corp.*, 330 NLRB 152, 160 (1999), and the burden of proving independent contractor status is on the party asserting it. *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 710-12 (2001) (party urging exclusion from the Act's protections bears the burden of persuasion); *Argix Direct, Inc.*, 343 NLRB 1017, 1020 (2004).

Longstanding Supreme Court, in-circuit, and Board precedent establishes that common-law agency principles apply when differentiating between employees and independent contractors under the Act. *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968); *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 496, 496 n.1 (D.C. Cir. 2009); *Roadway Package Sys., Inc.*, 326 NLRB 842 (1998). These common-law factors are:

- the extent of control that the employing entity exercises over the manner and means of the work;
- whether the individual is engaged in a distinct occupation or work;
- whether the individual bears entrepreneurial risk of loss and enjoys entrepreneurial opportunity for gain;
- whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work;
- the skill required in the particular occupation;
- whether the parties believe they are creating an employment relationship;

- whether the work in question is part of the employer’s regular business;
- whether the employer is in the business;
- the method of payment, whether by the time or by the job; and
- the length of time the individual is employed.

*FedEx*, 563 F.3d at 496 n.1; *BKN, Inc.*, 333 NLRB 143, 144 (2001); *Roadway*, 326 NLRB at 849-50 n.32; *Restatement (2d) of Agency* § 220. The Board cautions that the list of factors “is not exclusive or exhaustive.” *Arizona Republic*, 349 NLRB 1040, 1041 (2007) (citations omitted).

As the Supreme Court has recognized, “there is no shorthand formula or magic phrase” that can determine independent contractor status from one case to another, and the determination of employee or independent contractor status requires an evaluation of “all of the incidents of the work relationship,” with “no one factor being decisive.” *United Ins.*, 390 U.S. at 258. Similarly, the Board has observed that “[n]ot only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other.” *Roadway*, 326 NLRB at 850 (quoting *Austin Tupler Trucking*, 261 NLRB 183, 184 (1982)).

“Congress empowered the Board [in distinguishing between employees and independent contractors] to assess [the] significance [of the facts] in the first instance, with limited review” by the courts. *City Cab of Orlando, Inc. v. NLRB*, 628 F.2d 261, 265 (D.C. Cir. 1980). “As long as the Board’s conclusions accord with principles of agency law and the Board’s exercise of power does not spill over its jurisdictional boundaries, the court must, in light of this factual predicate to the legal determination, allow some latitude for the Board’s judgment.” *N. Am. Van Lines v. NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989). The Supreme Court has observed that the “task of defining the term ‘employee’ is one that ‘has been assigned primarily to the agency created by Congress to administer the [National Labor Relations] Act,” the Board. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984), quoting *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 130 (1944).<sup>7</sup>

Consistent with the standard of review set forth in Section 10(e) of the Act (29 U.S.C. § 160(e)), a reviewing court, therefore, will not “displace the Board’s choice between two fairly conflicting views [of the facts], even though the court would justifiably have made a different choice had the matter been before it *de*

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<sup>7</sup> The Supreme Court has reviewed the Board’s interpretation of at least one employee exclusion under the Act under the deferential principles outlined in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996) (upholding as reasonable Board’s interpretation of “agricultural laborer” exclusion); *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298 (1977) (same).

*novo.*” *United Ins.*, 390 U.S. at 260 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)); *Corporate Express*, 292 F.3d 777, 779 (D.C. Cir. 2002).

**B. The Board Reasonably Rejected the Orchestra’s Claim that Its Musicians Are Independent Contractors**

As in many cases in which the Board must determine whether individuals are statutory employees or independent contractors, the Board recognized (JA 248) that the record contained evidence both for and against its conclusion. In the Board’s reasoned judgment, however, the factors compelling a finding of employee status, particularly the fact that the musicians are not free to perform their work in the manner they choose, overshadowed those factors demonstrating independent contractor status.

**1. The Orchestra controls and directs where, when, how, and for how long the musicians work**

The Board first considered (JA 245) the control over the manner and means by which the musicians perform their work, finding that this factor “tips heavily” toward employee status. Specifically, the Board observed that the Orchestra “retains the right to control the music to be played in each program, which musicians are selected for it, how the musicians prepare, and how the music is performed.” (JA 245.) The Orchestra’s music director unilaterally decides which pieces the musicians practice, the length of time spent on each piece during rehearsal, and which combination of instruments will rehearse certain portions of

the music. The music director also enjoys sole discretion to make “artistic choices.” (JA 246.) Consequently, he may vary from the printed music and he directs “the precise volume, pitch, and blend of the ensemble. In sum, the music director has complete and final authority over how the musicians perform at both rehearsals and concert performances.” (JA 246.)

Such pervasive control over the details of the musicians’ work is fully consistent with a finding of employee status. *See BKN*, 333 NLRB at 144 (freelance television writers, artists, and designers were employees where employer exercised significant editorial control over their work); *Musicians Local 655 (Royal Palm Dinner Theatre)*, 275 NLRB 677, 682 (1985) (musicians were employees where employer exercised complete control over their work); *Castaways Hotel*, 250 NLRB 626, 642-44 (1980) (lounge musicians were employees because of overt control by the employer, including direction at rehearsals, selection of music, and instruction on how to play); *see also Seattle Opera v. NLRB*, 292 F.3d 757, 765 (D.C. Cir. 2002) (auxiliary choristers were employees where employer had right to control them “in the material details of their performance”). *Compare Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 847 (2004) (finding models to be independent contractors, in part, because they exercised full discretion over the form of their pose, including props and wardrobe).

Indeed, the elements of control here are remarkably akin to those in *Royal Palm*, wherein the Board, in finding an employment relationship, relied on the music director's unilateral role in selecting "the number and type of instruments to be used," "the time and place for the session," and the music to be played. 275 NLRB at 682. Further, like the Orchestra's music director, the music director in *Royal Palm* directed "every note played by the musicians," demonstrated "how the music was to be played," decided "the time necessary for rehearsal" and whether additional rehearsal time was necessary, and decided "when breaks were to be taken." *Id.* Accordingly, the Board concluded that "these factors all fully establish that [the music director] had complete control over not only the recording to be produced but the manner and means by which it would be produced. . . . [T]he musicians were under the continuous supervision and exercised control of [the director] and subject to his complete discretion and artistic interpretation and taste." *Id.*

The Board also considered (JA 246) the musicians' inability to work when they want and for how long they want, factors that are hallmarks of independent contractor status. *See, e.g., N. Am. Van Lines*, 869 F.2d at 600 (independent contractors able to refuse work and take time off whenever they wanted); *Argix Direct*, 343 NLRB at 1019 (independent contractors free to work or not on any given day without penalty). Here, the Orchestra determines the dates, and hours

for the mandatory rehearsals and concerts, meaning musicians forfeit any control over their work time once selected for a particular program. Indeed, the Orchestra conditions their ability to play in the performance on their attendance at the final rehearsal. (JA 245.) During rehearsals, the Orchestra music director designates when the musicians may take breaks and for how long. “Unlike a true independent contractor, for example, a roofer, who is hired to do a job but can mutually arrange with the owner or general contractor when to do it and control how long it takes, once they sign up for a program, the musicians have no control over their worktime.” (JA 246.) These types of control stand in stark contrast to the freedoms enjoyed by other individuals found to be independent contractors. Under these circumstances, the Orchestra’s musicians do not “enjoy[] significant freedom,” and the Board reasonably determined that such constraints over their schedule is a strong indicator of employee status. *See, e.g., Seattle Opera*, 292 F.3d at 765 (noting that auxiliary choristers were employees, in part, because they were required “to sign in when they arrive, on time, at each and every rehearsal and performance”); *News-Journal Co.*, 180 NLRB 864, 867 (1970) (finding newspaper deliverers to be employees, in part, because they “retain practically no independence in their operations; they cannot decide when or whether they will go out on an assigned route; they cannot fix the time of delivery;”), *enforced*, 447 F.2d 65 (3d Cir. 1971).

Other elements of the relationship between the musicians and the Orchestra demonstrate control. Specifically, in addition to the Orchestra's control over the substance and scheduling of the musicians' work, the Board found (JA 245) that the Orchestra further circumscribes their behavior by maintaining 24 rules of personal conduct for rehearsals and live performances, including prohibitions on crossing legs during concerts and rehearsal, bags or purses on stage, and talking. The guidelines instruct the musicians on conduct immediately before, during, and at the conclusion of the concert. They prescribe proper posture and playing positions and establish concert dress for the musicians. This type of control supports the finding of employee status. *See, e.g., NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1101 (9th Cir. 2008) ("Friendly's extensive, mandatory dress code for all of its taxicab drivers also constitutes additional evidence of control.").

Moreover, the Orchestra enforces its rules against the musicians. As the Board found, the Orchestra's "imposed and threatened" disciplinary measures "further evince[] control" over its musicians. (JA 245.) Orchestra President Robinson readily acknowledged that the Orchestra has the "power to discipline musicians for anything" (JA 91), and while rare, the Orchestra has issued a written reprimand to a musician for failure to adhere to the guidelines during a rehearsal. (JA 245.) The letter threatened further discipline, including possible suspension, if the musician did not correct her behavior. These levels of control are consistent

with an employer-employee relationship. *Cf. Arizona Republic*, 349 NLRB at 1044 (finding that newspaper carriers were independent contractors when “not subject to discipline, nor [] bound by work rules other than the Employer’s basic safety standards”); *St. Joseph News Press*, 345 NLRB 474, 478 (2005) (finding that newspaper carriers were independent contractors based in part on the carriers’ freedom to change order of delivery, disregard a delivery request without fear of discipline, and refuse to deliver to any customer the carrier deems unlikely to pay or to whom it would not be economically feasible to deliver).

The Orchestra contends (Br. 24-25, 31-32, 37) that the musicians control the manner and means of their performance because its efforts are simply to “monitor, evaluate, and improve the results of the ends of the worker’s performance.” (Br. 26, quoting *N. Am. Van Lines*, 869 F.2d at 599). The Orchestra’s claim, however, ignores the Board’s numerous express findings that the Orchestra controls, among other aspects, when, where and how the musicians rehearse and perform, for how long they rehearse, what they wear, how they behave on stage, and when they take breaks. These elements of control speak more to the manner and means of their work than the end product. The Court has characterized control over the ends of a worker’s performance as “global oversight,” *N. Am. Van Lines*, 869 F.2d at 599, that is distinguishable from the manner and means in which the worker performs her tasks with “[o]nly the latter ... establish[ing] employee status,” *id.* at 600. In

evaluating the manner and means of work, the Court looked to evidence of the freedom to choose when to work, what order to perform the work, and, for drivers, what specific routes to take to perform deliveries. *See id.* at 600-01.

The musicians enjoy none of these freedoms. To the contrary, the Orchestra mandates when they will work, in what order they will rehearse certain pieces (including the music director's unilateral decision as to when specific instruments will come in during a rehearsal and how long certain pieces will be rehearsed by specific musicians), and how to play these pieces, based on the music director's artistic vision. *See Royal Palm*, 275 NLRB at 682 (rejecting assertion that music director only controlled the musicians' end product because "the musicians were under [his] continuous supervision and exercised control [] and subject to his complete discretion and artistic interpretation and taste. It is difficult to perceive how [the music director] could have exercised more control over the manner and means of making the recording."). In fact, beyond focusing on the ultimate sound of the whole orchestra, the music director directs individual musicians' performances (pp. 9-10). Under these circumstances, the Board reasonably determined that the Orchestra's control exceeded that of mere monitoring to ensure a particular product.

The Orchestra also relies on its ends-versus-the-means distinction in relation to its personal conduct rules. The resolution of this case is not furthered by the

Orchestra's observation (Br. 24-25, 35-36) that efforts, like its conduct rules, to ensure customer satisfaction do not make a worker an employee. Obviously, all organizations are concerned with the quality of their products and customer satisfaction, whether their workers are employees or independent contractors. Thus, the same constraints – for example, that workers wear certain clothes, behave appropriately for the setting, or other conduct to ensure customer satisfaction – could apply to a roofer working as an independent contractor or a waiter working as an employee of a restaurant. The *reason* for the conduct rules therefore does not resolve whether the workers are employees or independent contractors.

Next, the Orchestra emphasizes (Br. 33, 35 n.7) certain activities of the principal musicians to dispute the Board's finding that the Orchestra controlled the musicians' performance. These factors, however, only show that the principal musicians have minimal input on some aspects of the rehearsal and the section's performance. They do not defeat the Board's finding that the music director is the ultimate authority to whom all the musicians must defer. Indeed, the Orchestra does not dispute, nor could it, that the music director controls all aspects of how the musicians produce the sound he envisions during rehearsals and live performances. And the mention of the principal's direction of discrete details (Br. 35 n.7) had no bearing on musicians' discipline because the Orchestra's president

acknowledged that the Orchestra itself has “the power to discipline musicians [] for anything.” (JA 91.) On balance, the record shows that, once committed to a series, the musician must yield to the Orchestra’s control over the substance and scheduling of her work and its demands of her personal behavior at rehearsals and performances.

Lastly, the Board’s Order belies any assertion (Br. 22-23) that the Board wrongly elevated the control factor above the others. Specifically, the Board plainly considered each factor in turn (JA 244-47) and did not allow any one factor to dominate the analysis. The Board’s Order is thus fully consistent with *United Insurance*.

- 2. The Board properly determined that entrepreneurial opportunity weighed in favor of employee status**
  - a. Under established precedent, musicians do not bear any entrepreneurial opportunity for gain or risk of loss**

The Board also considers whether an individual has an entrepreneurial interest in her business in analyzing the employment relationship. Entrepreneurial risk and opportunity exist when a worker can, “through [her] own efforts or ingenuity,” *Roadway*, 326 NLRB at 852, alter the terms of her work to increase her income on the job. For example, in *Arizona Republic*, newspaper carriers found to be independent contractors could increase their pay by negotiating their own piece rates, hiring substitutes, earning commission on new subscriptions, and delivering

other products while on their routes. 349 NLRB at 1045. Similarly, the drivers in *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 891-92 (1998), could “make an entrepreneurial profit” by performing additional work for customers for separate payment, using their trucks for personal business, and negotiating separate rates of compensation with the owner. Courts similarly consider the disputed individuals’ ability to work as entrepreneurs. *See FedEx*, 563 F.3d at 499-500; *Friendly Cab*, 512 F.3d at 1097.

The ability to subcontract or assign the work to others is a common characteristic of independent contractors. The Board and this Court have repeatedly recognized that, “[t]ypically an entrepreneur . . . may also hire subordinates.” *Corporate Express*, 292 F.3d at 780; *FedEx*, 563 F.3d at 499-500 (drivers found to be independent contractors because they have the ability to hire others to do the work and “can sell, trade, give or bequeath their routes”); *see also DIC Animation City*, 295 NLRB 989, 989 (1989) (writers could hire someone to type their work). Thus, an important gauge in the entrepreneurial opportunity analysis of the Court and the Board is the extent to which the disputed individuals can modify the terms of their work to their economic advantage or are bound by the terms of the hiring entity. *See Corporate Express*, 292 F.3d at 780 (recognizing that an entrepreneur “takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder”); *Friendly Cab*, 512 F.3d at 1098

(noting that an employee is one who does not have the ability “to operate an independent business and develop entrepreneurial opportunities,” make her own arrangements with clients, or develop her own goodwill, and lacks other entrepreneurial characteristics such as the ability to employ others); *BKN*, 333 NLRB at 145 (finding that writers were employees because they “are paid the per script fee set by the Employer and [] have no ability to increase their compensation through the exercise of discretion in how they perform their work”); *Roadway*, 326 NLRB at 852 (employee status found, in part, because “unlike the genuinely independent businessman, the drivers’ earnings do not depend largely on their ability to exercise good business judgment, to follow sound management policies, and to be able to take financial risks in order to increase their profits”); *DIC*, 295 NLRB at 990 (finding independent contractor status where writers bear some entrepreneurial risk in that they “exert time, effort, and travel to solicit work, but may have their ideas rejected”).

The Board reasonably determined (JA 247) that the musicians here display none of these hallmarks of entrepreneurial opportunity or risk. To the contrary, the Orchestra unilaterally sets the performance fee without negotiation. (JA 247.) If ticket sales are low for a particular performance, the musicians receive the same fee. A sold-out show similarly has no effect on their wage. A musician’s performance, regardless of how well or poorly it is executed, has absolutely no

bearing on her pay. In other words, unlike the entrepreneurs discussed in *Corporate Express*, *FedEx*, and similar cases, the musicians here cannot profit from working “smarter.” Further, unlike the long line of Board cases involving delivery drivers, the musicians have no proprietary interest in their “seat” in the orchestra. That is to say, they cannot assign or sell their place in the symphony, or hire someone to fill their seat at any given rehearsal or performance.

The Board expressly rejected (JA 247) the notion that the musicians exercise sufficient entrepreneurial potential to demonstrate independent contractor status merely because they could choose the performances in which to participate. Essentially, the musicians can only work more to increase their income, not work smarter as is typical of independent contractors. The Board correctly observed that, “[t]he choice to work more hours or faster does not turn an employee into an independent contractor.” (JA 247.) The Board also determined that the musicians’ ability to work for other orchestras did not “weigh heavily in favor of a finding of independent contractor status.” (JA 247.) Rather, that the musicians may hold more than one job or work for other orchestras “simply reflects the part-time nature of the [Orchestra’s] performance schedule.” (JA 247.) Indeed, like the animation industry in *BKN*, the entertainment industry’s “irregular patterns of employment must be taken into account in determining [employment] status under the Act . . . [and] explains the absence of some of the usual indicia of employee status.” 333

NLRB at 145. Moreover, the Board accommodates the fact that certain industries have intermittent working patterns by establishing an “eligibility formula for voting in an election, rather than excluding such workers from the Act’s coverage as independent contractors.” (JA 247, citing *Kansas City Repertory Theatre, Inc.*, 356 NLRB No. 28, 2010 WL 4859825 (Nov. 10, 2010)). Thus, the Board gave little weight to this factor “in the context of this case.” (JA 247.)

In short, the Board found no evidence of entrepreneurial gain or loss, and concluded that this factor weighed in favor of an employment relationship.

**b. The Orchestra’s claim that the Board should have focused on entrepreneurial opportunity as the most important factor must be rejected**

Before the Court, the Orchestra argues (Br. 21-30) that the Board failed to focus, over all other factors, on whether the musicians had a “significant entrepreneurial opportunity for gain or loss.” In support of this claim, the Orchestra relies on (Br. 24-27) this Court’s decisions in *FedEx* and *Corporate Express*. As we show, the Orchestra has failed to preserve any attack on the Board’s consideration of the common-law factors.

Under the Board’s rules, “a party must raise all of his available arguments in the representation proceeding.” *Pace Univ. v. NLRB*, 514 F.3d 19, 23 (D.C. Cir. 2008) (collecting cases); *George Washington Univ. v. NLRB*, 2006 WL 4539237 (D.C. Cir. Nov. 27, 2006). Here, the Orchestra could have, but did not, raise its

claim that entrepreneurial opportunity for gain and loss is the paramount factor in the representation proceeding. Instead, the Orchestra first raised its claim in the unfair-labor-practice case. That was too late under the Board's procedures.

During an unfair-labor-practice proceeding, the Board does not review issues that were fairly litigable during the representation proceeding. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); *Salem Hosp.*, 357 NLRB No. 119, 2011 WL 5976073, at \*3 n.5 (Nov. 29, 2011). Absent special circumstances not present here, a party may not relitigate issues that were or could have been litigated in a prior representation proceeding. *See generally NLRB v. Best Prods. Co.*, 765 F.2d 903, 909 (9th Cir. 1985) (“[A]n employer who challenges a representation election irregularity must present its objection both in the certification proceeding and the [unfair-labor-practice] proceeding to preserve the issue for appellate review.”).

Judicial enforcement of the settled rule that a party must raise all available arguments in the representation proceeding accords with the basic principle that “[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.” *U.S. v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952), *quoted in Pace Univ.*, 514 F.3d at 24; *see also*

Section 10(e) of the Act, 29 U.S.C. § 160(e), which provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” *See Pace Univ.*, 514 F.3d at 24 (citing 29 U.S.C. § 160(e)). Because the Orchestra failed to raise its concerns in “the time appropriate under [the Board’s] practice” (*L.A. Tucker Truck Lines*, 344 U.S. at 37), its contention that entrepreneurial opportunity must be given greatest weight was untimely raised. Accordingly, those claims cannot be considered on review. *L.A. Tucker Truck Lines*, 344 U.S. at 36-37.

The first time that the Orchestra argued that entrepreneurial opportunity must be given greater weight based on a test “confirmed” (Br. 24) by the Court in *FedEx* or *Corporate Express* or that any “shift” (Br. 23) existed in the Board’s analysis was in its opposition to the Acting General Counsel’s motion for summary judgment during the unfair-labor-practice proceeding. (JA 266-67.) This argument came too late.

In the representation case, the Orchestra submitted a post-hearing brief to the Regional Director and filed with the Board both a brief in opposition to the Union’s request for review of the Regional Director’s decision and a supplemental brief once the Board granted review. In those filings, the Orchestra’s arguments took all of the factors equally. It never urged the Board to apply a standard

whereby all other factors “should give way to the significant entrepreneurial opportunity for economic gain or loss.”<sup>8</sup> (Br. 23.) To the contrary, the Orchestra repeatedly argued (JA 264-66, 272) that the Regional Director’s analysis under the traditional common-law agency test and her reliance on *Pennsylvania Academy* was without reproach.<sup>9</sup>

In reversing the Regional Director’s decision and reinstating the petition, the Board, like the Regional Director and the Orchestra, invoked the multi-factor common-law agency test, but ultimately reached a different result.<sup>10</sup> In its decision, the Board considered each of the factors in turn following the longstanding Supreme Court-countenanced notion that no single factor is dispositive and all factors are relevant. (JA 245, citing *United Ins.*, 390 U.S. at

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<sup>8</sup> In its post-hearing brief in the representation case (JA 229-30, 236 n.4), the Orchestra never claimed entrepreneurial opportunity is always the most significant, indeed dispositive, factor in the ten-factor analysis. Its reliance on *Comedy Store* there (JA 229-30) is consistent with the Board’s view (pp. 38-40) that the relative weight of the ten factors simply follows the specific evidence in each case. Its claim (JA 236 n.4), without citation, that the musicians have potential for profit or loss in “their own distinct business of being a musician” is a factual point going only to whether these musicians have entrepreneurial opportunity. These statements are not the same as the Orchestra’s current position that the Board erred, as a matter of law, by not holding that entrepreneurial opportunity is always the most significant factor.

<sup>9</sup> The Regional Director’s decision predates *FedEx* and does not cite *Corporate Express*.

<sup>10</sup> The Board determined that the Regional Director weighed certain evidence too heavily and relied on distinguishable precedent. (JA 245.)

258.) Moreover, after the Board issued its Decision on Review and Order, the Orchestra still did not claim the Board erred by not elevating entrepreneurial opportunity above the other factors. It could have availed itself of the opportunity under Section 102.65(e)(1)-(2) of the Board's Rules and Regulations (29 C.F.R. § 102.65(e)(1)-(2)), to file a motion for reconsideration, in which it could have made that argument. Thus, where the Board applied the very same test applied and advocated by the Orchestra in the representation case, it is hardly fair for the Orchestra to seek reversal by claiming that standard was incorrect.

**c. In any event, the Board properly weighed entrepreneurial opportunity**

Even if the Court were to consider the Orchestra's jurisdictionally barred argument that entrepreneurial opportunity is the most important factor, it would not change the result in this case. The Orchestra's various challenges (Br. 23-26, 27-28) in this vein misapprehend in what situations entrepreneurial opportunity may overshadow the other factors and how the Board and the courts define entrepreneurial opportunity. As discussed more fully below, entrepreneurial opportunity is not the dominant, decisive factor in all cases, and it encompasses a risk and reward type analysis, the characteristics of which are decidedly absent from this record.

The Orchestra suggests (Br. 19-22) that *Comedy Store*, 265 NLRB 1422 (1982), *FedEx*, and *Corporate Express* establish that the Board and the courts must

resolve a worker's status by invoking a test whereby all common-law agency factors yield to whether a significant entrepreneurial opportunity for economic gain or loss exists. Board and court precedent establish no such test. Rather, these cases and others demonstrate only that determinations of independent contractor or employee status depend entirely on the particular facts of a case. As previously noted (p. 19-20), the unique factors of each case drive the appropriate weight and significance of each of the ten considerations, and in the cases cited by the *Orchestra*, the records were more weighted toward entrepreneurial opportunity and consequently, so is the Board's analysis. *See Roadway*, 326 NLRB at 850 (“[T]he same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors.”).

In *Comedy Store*, the Board determined that a comedy club had shown on the “peculiar, particular facts” of *that record*, 265 NLRB at 1440, that its hired stand-up comedians were independent contractors. *Id.* at 1450. The Board repeatedly observed that it was examining only whether, on balance, the factors in that specific case persuasively suggested independent-contractor status. *Id.* at 1449. Ultimately, the Board decided that the evidence of entrepreneurial opportunity and other factors, including the comedians' control over their performances, demonstrating that the comedians were independent contractors overshadowed the countervailing evidence showing employee status. *Id.* at 1422

n.1, 1449-50. There was no wholesale announcement that the Board considers entrepreneurial opportunity to be the predominant factor in resolving all cases.<sup>11</sup> Subsequent Board cases cite *Comedy Store* for its conclusion on control and none recognizes it as the genesis of any shift in the Board's analysis, contrary to the Orchestra's suggestion (Br. 23). *See, e.g., Merry Oldsmobile*, 287 NLRB 847, 848 (1987) (citing *Comedy Store* for "right to control" test); *Royal Palm*, 275 NLRB at 682 (same). Indeed, *Comedy Store* affirms that all factors should be considered with no single factor dispositive and no "short hand formula or magic phrase" to resolve the issue. 265 NLRB at 1439-40.

The same can be said for *FedEx* and *Corporate Express*, neither of which cites *Comedy Store*. In those two cases, both involving delivery drivers, the Court indicated that because many of the agency factors cut both ways, the focus, in cases involving similar commercial driver circumstances, should be on whether the drivers have the ability to increase their income through some proprietary interest in their routes. "Thus, while all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism." *FedEx*, 563 F.3d at 497.

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<sup>11</sup> The Orchestra seems to recognize that its reading of *Comedy Store* is tenuous at best. *See* Br. 23 (referring to Board's "at least implied[]" emphasis on entrepreneurial opportunity).

That is to say, the drivers have the “corresponding opportunity to profit from working smarter, not just harder.” *Corporate Express*, 292 F.3d at 780.

In short, these three cases stand for the unremarkable proposition that the Board’s analysis looks at all ten factors, but ultimately follows the weight of the evidence. Indeed, this view of the case law is consistent with the Supreme Court’s pronouncement that no factor is decisive. *See United Ins.*, 390 U.S. at 258. Board cases after *Corporate Express* similarly bear out this view of the case law and put to rest the Orchestra’s claim (Br. 22) that the Board somehow “deviated” from its own precedent. *See, e.g., FedEx Home Delivery*, 361 NLRB No. 55, 2014 WL 4926198, \*1 (Sep. 30, 2014) (“[W]e reaffirm the longstanding position – based on the Supreme Court’s *United Insurance* decision – that, in evaluating independent-contractor status in light of the pertinent common-law agency principles, all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.”) (internal citations and quotations omitted);<sup>12</sup> *Arizona Republic*, 349 NLRB at 1043-44 (analyzing *all* factors of the agency test without elevating entrepreneurial opportunity above all others); *Pennsylvania Academy*, 343 NLRB at 847 (same). Thus, the import of the language in *FedEx* and *Corporate Express*

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<sup>12</sup> In deciding the unfair-labor-practice case here, the Board did not revisit the 2011 representation-case decision and therefore did not rely on its 2014 *FedEx* decision in which the Board re-affirmed certain principles and clarified the appropriate independent-contractor test.

cited (Br. 23-24) to support a shift in Board law is unclear where the Board itself has never stated that the entrepreneurial opportunity is the decisive factor in *all* cases, and it continues to invoke the general ten-factor test.<sup>13</sup>

The Board's decision here aligns with these cases and gives appropriate weight, on this record, to each of the common-law agency considerations. The presence of such pervasive control over the method and means of the musicians' performance readily distinguishes this case from *Comedy Store*, wherein the Board found that the comedians themselves exercised control over their own performances. 265 NLRB at 1422 n.1. Further, the Court's decisions in *FedEx* and *Corporate Express* fully support the Board's decision. In *Corporate Express*, the drivers were employees, in part, because they lacked entrepreneurial opportunity where they could not subcontract their routes or use their vehicles for other jobs. 292 F.3d at 780-81. In *FedEx*, the Court found that the existence of these opportunities supported the opposite conclusion – that the drivers there were

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<sup>13</sup> The Board's decision not to seek Supreme Court review of the Court's decision in *FedEx* can hardly be characterized as having "acquiesced" (Br. 19 n.4) to the Court's decision and analysis. Even if *FedEx* is read to apply a different test, it has long been the Board's judgment that "a uniform and orderly administration of a national act" necessitates application of only established Board and Supreme Court precedents – as opposed to precedents of the circuit courts of appeals that are adverse to the Board and not the law of the case. *Ins. Agents' Int'l Union*, 119 NLRB 768, 773 (1957), *rev'd on other grounds*, 361 U.S. 477 (1960); *Ford Motor Co.*, 230 NLRB 716, 718 n. 12 (1977), *enforced*, 571 F.2d 993, 996-1002 (7th Cir. 1978), *affirmed*, 441 U.S. 488, 493 n.6 (1979).

independent contractors. 563 F.3d at 499-500. Depending on the success of their efforts to subcontract their routes to other drivers and to use their trucks for other purposes, the drivers in *FedEx* could still turn a profit despite never doing the deliveries themselves.

The Orchestra musicians, like the *Corporate Express* drivers, enjoy no similar ability to profit. While they could assist in finding suitable replacements (p. 7), they could not profit by it. The musicians, therefore, have no opportunity to work smarter to increase their financial gain or otherwise alter the terms of their work with the Orchestra to their economic advantage. Under these circumstances, there was little “entrepreneurial opportunity” upon which the Board could focus. As such, on this record and these particular, peculiar facts, the Board reasonably found that the Orchestra’s right to control the musicians’ performance, among other factors discussed below, demonstrated their employee status, and the minimal weight of any evidence of entrepreneurial opportunity did not overcome that finding.

The Orchestra’s claim (Br. 27-29) that the musicians exercise entrepreneurial opportunity because they select which performances they will play is unsupported by the Board and judicial precedent. As discussed in more detail above (pp. 31-33), entrepreneurial opportunity involves the ability to modify the work to increase profit, not simply control over the number of hours one works. For example, a

student who opts to work weekends due to mid-week classroom obligations cannot be said, *on that basis alone*, to be an independent contractor. Similarly, the Orchestra's suggestion (Br. 29) that the musicians enjoy entrepreneurial opportunity because they could simply practice fewer hours misses the mark. While the record does not establish the number of hours the musicians practice, the fact remains that any reduction in practice time does not affect their compensation for Orchestra performances. Practice or no practice, the musicians receive the same pay from the Orchestra. Moreover, the record is equally unresponsive of the notion (Br. 3, 4, 8, 9, 16, 29) that the musicians' choice of practice time affects other job opportunities such that they practice less to accommodate other jobs and more when no other work is available.

Further, the Orchestra's claim (Br. 29) that its limited schedule supports a finding that the musicians are independent contractors finds no support in either *Comedy Store* or *Pennsylvania Academy*. As shown above (pp. 39-40), *Comedy Store* does not stand for the general proposition that a worker who selects which jobs to perform is, by definition, an independent contractor. Rather, the Board based its finding that the comedians were independent contractors on a number of factors, including the freedom to develop their own routines with limited constraints from the venue. The musicians enjoy no similar freedom. With respect to *Pennsylvania Academy*, the models "exercise[d] complete control over their own

schedule” in that they could decide how many classes to accept and which hours to work. 343 NLRB at 847. This level of freedom meant that some models chose only to work 1.5 hours in a semester, while others chose hundreds of hours. *Id.* As the Board noted (JA 246), “[u]nlike the models in *Pennsylvania Academy* . . . the musicians are required to attend all rehearsals on dates and at times set by the music director and all performances on dates set by the [Orchestra].”

In short, the Orchestra has failed to demonstrate that the musicians bear any characteristics of entrepreneurial opportunity as the Board and the Court define that notion. Further, its assertion that the Board should have elevated entrepreneurial opportunity above all other considerations is both untimely and unsupported by Board or judicial precedent.

**3. The musicians’ work is part of the Orchestra’s regular business of providing live music**

The Board next considered (JA 247) whether the musicians’ work was in furtherance of the Orchestra’s regular business. *See Aurora Packing Co. v. NLRB*, 904 F.2d 73, 76 (D.C. Cir. 1990) (“[T]he Board may legitimately consider whether a worker plays an essential role in a company’s business, presumably because the company more likely than not would want to exercise control over such important personnel.”); *Arizona Republic*, 349 NLRB at 1046 (finding that newspaper distribution was an integral part of the employer’s business, which favored employee status). The Orchestra provides live music in the Lancaster area, and the

musicians are plainly in the business of performing music. “The success and failure of the [Orchestra] is dependent on the services rendered by the musicians, and the Orchestra cannot conduct its business without them.” (JA 247.) The Board therefore reasonably determined, given the integrally related functions of the Orchestra and its musicians, that this factor supports a finding of employee status. *Cf. Pennsylvania Academy*, 343 NLRB at 847 (finding evidence of independent contractor status where employer was in business of providing instruction to art students, while models were in the business of modeling).

**4. The Orchestra unilaterally controls the rate of compensation and the payment scheme approximates an hourly wage**

As a general matter, the Board will find that a method of compensation based on the number of hours worked indicates an employment relationship, whereas a flat fee for services tends to demonstrate a worker’s status as an independent contractor. *See Young & Rubicam Int’l, Inc.*, 226 NLRB 1271, 1276 (1976); *Am. Broad. Co.*, 117 NLRB 13, 18 (1957). Here, the Orchestra unilaterally determines the set amounts that all principal musicians and section musicians receive for each appearance at a rehearsal or performance. Each service is divided into 15-minute increments, and the musicians receive additional compensation for every 15-minute segment after 2.5 hours. “In other words, the musicians are not paid for the job such that they can effectively earn more money by completing the

job more quickly . . . . Rather, they are paid based on the time they spend working for the Orchestra.” (JA 248.) Thus, unlike the writers in *DIC* and the photographers in *Young & Rubicam*, who were paid a set fee regardless of the amount of time spent drafting the script or developing the photograph, the musicians here cannot simply work faster to obtain additional compensation. Accordingly, the Board found that this factor, too, supported a finding of employee status. (JA 248.)

**5. The balance of the remaining common-law agency factors does not support a clear finding of either independent contractor or employee status**

The Board found (JA 248) that the remaining common-law agency factors failed to indicate the musicians’ status as either independent contractors or employees. Specifically, both the musicians and the Orchestra provide the necessary tools and instrumentalities – the musicians supply their own instruments, but the Orchestra provides the music, the stands, certain of the larger instruments, and the venue. Equally ambiguous, as the Board found (JA 248), was the parties’ belief as to the type of relationship created. The Orchestra characterized the relationship as that of an independent contractor in its agreement with the musicians. As the Board observed (JA 248), however, at least one of the musicians considered himself to be an Orchestra employee, and, at a minimum, 30 percent of the musicians signed cards reflecting their interest in being represented as

employees by the Union. The length of employment was also inconclusive. Musicians commit to work for a fixed one-year period, which favors independent contractor status, but “many of the musicians return year after year and have worked for the [Orchestra] for long periods of time.” (JA 248.) *See Painting Co. v. NLRB*, 298 F.3d 492, 496 (6th Cir. 2002) (painters were employees despite only being hired for two-week job).

The Board also found (JA 248) that consideration of the highly skilled nature of the musicians’ work offered little guidance on the ultimate determination of their status because many types of highly skilled employees, even in specialized industries, are covered by the Act. *See, e.g., Seattle Opera*, 292 F.3d at 763 (auxiliary choristers); *Metro. Opera Ass’n*, 327 NLRB 740 (1999) (solo singers, choristers, ballet and principal dancers); *N. Am. Soccer League*, 236 NLRB 1317 (1978) (professional soccer players), *enforced*, 613 F.2d 1379 (5th Cir. 1980); *Am. League of Prof’l Baseball Clubs*, 180 NLRB 190 (1969) (baseball umpires). Lastly, the Board was unconvinced (JA 248) that whether the musicians are engaged in a distinct professional occupation had any bearing on the determination.

After careful examination of all the common-law agency factors, as dictated by the Supreme Court in *United Insurance*, the Board reasonably determined that “on balance . . . the factors favor finding the symphony orchestra musicians to be

statutory employees rather than independent contractors,” and the Orchestra failed to carry its burden to show that they are excluded from the Act’s protection.<sup>14</sup> (JA 248.) The Board’s decision constitutes a reasonable choice between two fairly conflicting views, and the Orchestra has offered the Court no reason to disturb the Board’s conclusion.

**C. The remaining cases cited by the Orchestra are distinguishable**

The Orchestra asserts (Br. 32-33) that the Board’s decision conflicts with *Lerohl v. Friends of Minnesota Sinfonia*, 322 F.3d 486 (8th Cir. 2003), and *Florida Gulf Coast Symphony, Inc. v. Florida Dep’t of Labor & Emp’t Sec.*, 386 So.2d 259, 264 (Fla. Ct. App. 1980). As a preliminary matter, it bears noting the obvious – neither case is binding on the Court. More importantly, neither case provides any reasoned basis to reverse the Board’s Order here.

With respect to *Lerohl*, on summary judgment, the Eighth Circuit determined that the Equal Employment Opportunity Commission (“Commission”) erred in finding that two symphony orchestra musicians were employees for

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<sup>14</sup> The Orchestra highlights (Br. 38) the tax treatment of the musicians and their lack of benefits, neither of which is significant. *See Southern Cab Corp.*, 159 NLRB 248, 251 n.4 (1966) (“[W]e do not regard as determinative [in the employment relationship analysis] the fact that . . . the Employer does not make payroll deductions and the drivers pay their own social security and other taxes (*Miller Road Dairy*, 135 NLRB 217, 220 [1962]).”); *see generally Seattle Opera*, 292 F.3d at 763 n.8 (tax treatment is “of little analytical significance” in determining Section 2(3) employee status).

purposes of Title VII law. 322 F.3d at 492. In that case, the court of appeals evaluated the Commission's decision *de novo*, without any consideration of whether the federal agency, like the Board, was choosing between two fairly conflicting views.<sup>15</sup> Further, due to the posture of the case, there is little to no recitation of facts, making a comparison of the level of control exerted on the musicians impossible. A reading of *Lerohl* does not disclose whether rehearsals were mandatory, whether the music conductor dictated every logistical aspect of the rehearsal – from breaks to length and dates of rehearsals – or whether the music director subjected the musicians to constant and pervasive control over their play. At a minimum, several relevant facts distinguish the two cases. In *Lerohl*, the musicians were paid per performance, whereas here, the pay structure approximates an hourly wage. Additionally, the Eighth Circuit's statement that the "key distinction" in finding no control was the musicians' discretion to play elsewhere, or "freedom of choice" principles, *id.* at 491, is at odds with Board case law recognizing that even part-time employees who work for multiple employers can be statutory employees.<sup>16</sup> Lastly, the Eighth Circuit also found "highly

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<sup>15</sup> The *Lerohl* court tacitly recognizes that the standard of review is significant and may compel different results. In its decision, the Eighth Circuit rejects this Court's "more relevant labor law" decision in *Seattle Opera*, noting that the majority in that case "relied heavily on the deference due to the NLRB's decision." *Lerohl*, 322 F.3d 490.

<sup>16</sup> In this regard, the Eighth Circuit states that "[o]bviously, professional musicians

significant” the fact that the symphony refrained from withholding taxes. *Id.* at 492. As shown above (p. 48 n.13), neither the Court nor the Board views this factor as dispositive.

With respect to *Florida Gulf Coast Symphony*, several critical factual distinctions demonstrate that this case is also inapposite.<sup>17</sup> Most notably, “[t]he remuneration received by each musician is *individually negotiated by the musician and the [symphony].*” *Florida Gulf Coast Symphony*, 386 So.2d at 261 (emphasis added). There was also evidence, which the court considered persuasive, that “practice time constitutes substantially more than two-thirds of the time [that] the musician expends in satisfying his obligation to [the symphony].” *Id.*<sup>18</sup> The musicians in that case also considered themselves independent contractors and were paid per job. *Id.* at 264. These factors are noticeably absent from this record.

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have the option of becoming employees of a particular band or orchestra. . . . But other musicians may prefer to remain ‘free-lance,’ committing themselves fully to no client and retaining the discretion to pick and choose among available engagements.” *Lerohl*, 322 F.3d at 491. This approach assigns paramount importance to the number of hours one works. Again, this proposition, at odds with extant Board law, is not a component of the common-law agency test.

<sup>17</sup> There is no discussion in the case of the court’s standard of review. It appears as though the reviewing court gave the state agency’s final order no deference.

<sup>18</sup> While the Orchestra repeatedly emphasizes (Br. 3, 4, 8, 9, 16, 29) the individual practice time of its musicians, the record does not reflect a consistent time commitment among the musicians, unlike those in *Florida Gulf Coast Symphony*. Rather, the record only establishes that some Orchestra musicians practice a lot and others almost not at all, with no indication of why individual practice time differs.

Accordingly, the Florida state court's analysis provides the Court no guidance on this case.

Additional cases cited by the Orchestra (Br. 33-37) are not dispositive, and a brief recitation of the relevant factors demonstrates their inapplicability. In *Young & Rubicam*, the photographers conducted their activities as corporations; employed others; rented the studios, including darkrooms, where almost all of the assigned work occurred; generally earned a flat fee based on the intended use of the photograph, not the time spent producing it; and exercised technical and creative control. 226 NLRB at 1274-75. In *Associated Musicians of Greater Newark*, 206 NLRB 581, 589 (1973), *enforced*, 512 F.2d 991 (D.C. Cir. 1975), an orchestra director independently contracted with a venue to provide orchestra music. The director selected, hired, and paid the orchestra employees. *Id.* The venue imposed certain criteria on the orchestra director, including music preferences and appearance and on-stage behavior standards for the musicians. *Id.* The venue was not the musicians' employer because it had no role in setting rehearsals, determining breaks, developing or executing the director's artistic vision, or otherwise dictating to the musicians how to perform. In *American Guild of Musical Artists*, 157 NLRB 735 (1966), the Board determined that ballet dancers were independent contractors on the basis of such factors as the engagement was for three days, the dancers received lump sum payments, the symphony could not

terminate the dancers' services, and the dancers "were allowed considerable latitude in interpreting their roles as they saw fit." *Id.* at 736 n.1, 741. Lastly, in *DIC Animation City*, 295 NLRB 989, 989-90 (1989), the Board found that writers were independent contractors because they formed their own companies; created the story ideas; were only paid if their work was accepted; hired others to do their work; sometimes worked in teams, dividing the work and compensation; negotiated over royalties and guaranteed work on future projects; and set their own hours and place of employment.

In short, each of these cases above is distinguishable for the critical factors listed, and the Board did not depart from its own precedent in making its conclusions in this fact-intensive analysis. The Orchestra has not offered sufficient basis for this Court to determine that the Board erred in choosing between two fairly conflicting views. Accordingly, by refusing to bargain with the Union, the Orchestra has violated Section 8(a)(5) and (1) of the Act.

## CONCLUSION

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

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# **ADDENDUM**

## STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act (“the Act”), 29 U.S.C. §§ 151, et. seq., are excerpted below:

### **Section 2(3) of the Act (29 U.S.C. § 152(3)): Definitions**

The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

### **Section 7 of the Act (29 U.S.C. § 157): Rights of employees.**

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 of 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 158(a)(3) of this title.

### **Section 8 of the Act (29 U.S.C. § 158): Unfair Labor Practices.**

#### **(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 157 of this title;

\* \* \*

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

**Section 9 of the Act (29 U.S.C. § 159): Representatives and Elections.**

**(c) Hearings on questions affecting commerce; rules and regulations**

- (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
  - (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) subsection (a) of this section; or
  - (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) subsection (a) of this section; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.
- (2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) section 160(c) of this title.
- (3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes

and provisions of this Act subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

**(d) Petition for enforcement or review; transcript**

Whenever an order of the Board made pursuant to section 10(c) section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

**Section 10 of the Act (29 U.S.C. § 160): Prevention of Unfair Labor Practices.**

**(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. . . .

\* \* \*

**(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.

**(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 a court a written petition praying that the order of the Board be modified or set aside.

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

LANCASTER SYMPHONY ORCHESTRA	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 14-1247
	)	14-1272
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	4-CA-082327
	)	
and	)	
	)	
THE GREATER LANCASTER FEDERATION	)	
OF MUSICIANS, LOCAL 294, AMERICAN	)	
FEDERATION OF MUSICIANS, AFL-CIO	)	
	)	
Intervenor	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 12,636 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

/s/ Linda Dreeben  
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Dated at Washington, DC  
this 11th day of May, 2015

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OF MUSICIANS, LOCAL 294, AMERICAN	)	
FEDERATION OF MUSICIANS, AFL-CIO	)	
	)	
Intervenor	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on May 11, 2015, 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 the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they a registered user or, if they are not by serving a true and correct copy at the address listed below:

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Dated at Washington, DC  
this 11th day of May, 2015