

No. 15-10429-F

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 15-10429-F

CREW ONE PRODUCTIONS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**UNITED STATES COURT OF APPEALS
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CREW ONE PRODUCTIONS, INC.	:	
	:	
Petitioner	:	No. 15-10429-F
	:	
v.	:	
	:	
NATIONAL LABOR RELATIONS BOARD	:	
	:	
Respondent	:	

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fed. R. App. R. 26.1 and Local Rule 26.1-1, the National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, hereby certifies that the following persons and entities have an interest in the outcome of this case:

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4. Crew One Productions, Inc., Petitioner
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Dated at Washington, D.C.
this 24th day of June 2015

STATEMENT REGARDING ORAL ARGUMENT

The Board agrees with Petitioner/Cross-Respondent Crew One Productions, Inc., that oral argument will aid the Court in the decisional process. The Board requests to participate and submits that 15 minutes per side would be sufficient.

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of Crew One Productions, Inc. (“the Company”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against the Company on January 30, 2015, and reported at 362 NLRB No. 8. The Board had subject matter jurisdiction over the proceeding below under

Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. § 151, et seq. The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), because the Board’s Order is final and the unfair labor practices occurred in Georgia. The Company’s petition and the Board’s cross-application were timely because the Act places no time limit on the initiation of review or enforcement proceedings.

As the Board’s unfair-labor-practice Order is based, in part, on findings made in an underlying representation proceeding (D&O 1),¹ the record in that proceeding (Board Case No. 10-RC-124620) is also 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). Under Section 9(d), the Court has jurisdiction to review the Board’s actions in the representation proceeding solely for the purpose of “enforcing, modifying or setting aside in whole or in part the [unfair-labor-practice] order of the Board.” 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the

¹ “D&O” references are to the Board’s Decision and Order and “DDE” references are to the Regional Director’s Decision and Direction of Election. “Tr.” references are to the hearing transcript, “BDX” references are to the Board’s exhibits, “RX” to the Company’s exhibits, and “MSJ” references are to the General Counsel’s Motion for Summary Judgment and attached exhibits. “Br.” references are to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

representation case in a manner consistent with the ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

STATEMENT OF THE ISSUES

The ultimate issue in this case is whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the duly certified representative of its employees, the International Alliance of Theatrical Stage Employees ("the Union"). That question turns on two subsidiary issues from the underlying representation proceeding:

1. Whether the Board reasonably found that the Company's stagehands are statutory employees, not independent contractors.
2. Whether substantial evidence supports the Board's finding that the Union does not have a disabling conflict of interest precluding it from representing the stagehands.

STATEMENT OF THE CASE

This unfair-labor-practice case arises from the Company's admitted refusal to recognize or bargain with the Union as the certified representative of its stagehands. In the underlying representation proceeding, the Board rejected the Company's challenges to the Union's certification. (D&O 1.) Having rejected those challenges, the Board held (D&O 1-2) that the Company's refusal to bargain

violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). The facts and procedural history relevant to both the representation and unfair-labor-practice proceedings are set forth below.

I. STATEMENT OF FACTS

A. The Stagehands' Relationship with the Company

The Company, which has offices in Georgia and Tennessee, provides “stagehand” staffing—from unskilled laborers to specialized workers such as forklift operators, audiovisual technicians, and riggers—for theatrical and industrial productions at various venues in the greater Atlanta, Georgia metropolitan area. (D&O 1-2, DDE 3; Tr. 25-26, 27-30.) Most events last one to two days, although the Company typically provides stagehands for about 20 events each year that last five days or longer. (DDE 3; Tr. 251-52.) As a labor provider, the Company maintains a database of approximately 500 individuals that contains information regarding their skills, preferences, and pay rates. (DDE 4; Tr. 25, 38, 224, 226, 373.) During 2013, 464 stagehands worked for the Company. (DDE 4; RX 19.) The Company also employs 12 admitted managerial and clerical employees, including three at its Atlanta office. (DDE 3; Tr. 25, 253.)

Generally, when producers require labor to set up, take down, and staff an event, they contact the Company, describe the number and classification of stagehands they need, and solicit a price estimate. (DDE 4; RX 9, Tr. 26.) If the

Company and a producer (also known as a client) reach an agreement, the Company consults its database of stagehands. It then offers the work opportunity, normally via email, to selected individuals, who may accept or decline the offer. (DDE 4; RX 11, Tr. 25-26, 58, 88, 122-23, 151, 155, 373-75, 400.) The Company does not guarantee stagehands regular work and they are free to accept work from other labor providers. (DDE 7; Tr. 39, 45, 48, 64, 117, 129, 146-47, 154, 375-76, 416.)

In order to secure work with the Company, stagehands must first complete its database questionnaire, which they typically do online. (DDE 4; RX 5, 13, Tr. 38-39, 117.) The questionnaire requests information regarding the stagehands' skills, certifications, references, education, age, and availability for work. (DDE 4; RX 5, 13, Tr. 39.) The Company then instructs stagehands to attend an orientation session at its Atlanta office, during which it provides them with a packet of materials, including an IRS Form W-9, directions to various venues, an independent-contractor agreement, an additional questionnaire, and a list of its policies. (DDE 4; RX 7-8, Tr. 44-47, 63, 194-96.) Those policies include a dress code, a list of items stagehands must bring to each event, the procedures they must use to accept and decline work, and the protocol they must follow when interacting with unpleasant client personnel at a venue. (DDE 4; RX 8, Tr. 47, 55, 57, 65, 192-93.) The independent-contractor agreement provides that stagehands' "status

is that of an independent contractor” and explains that they are responsible for all federal and state taxes. (RX 8 p. 13.) It further states that stagehands “understand that [they] are hired on an individual project basis,” that they have the right to set their own hours, and that payment will be negotiated for each individual project. In addition to attending the orientation, stagehands must complete the W-9 form and an additional questionnaire, and sign the independent-contractor agreement, before the Company will offer them work. (DDE 4; Tr. 61, 63, 65.)

After accepting an offer and arriving at a venue, stagehands must check in with the Company’s on-site project coordinator before starting work. (DDE 5; Tr. 55, 67-69, 126, 135-37, 139, 162-63, 164, 384, 386-87, 393, 410-11.) They must also check out with the Company’s coordinator after completing their work, or if they have to leave prior to completion. The client specifies when it will need stagehands and the Company sets the start time of the job accordingly. Typically, the Company requires stagehands to arrive 30 minutes before the client’s designated time. (DDE 5; Tr. 76, 125, 134, 164, 410.)

Before stagehands begin working, the Company’s project coordinator normally “departmentalizes” them by assigning each individual to a particular classification, such as lighting, sound, or rigging, based on his skill and experience as set forth in the database questionnaire. (DDE 5; Tr. 53, 67, 200, 218-19, 385-86.) The coordinator then assigns the departmentalized stagehands to work under

the direction of the producer's personnel in charge of the corresponding types of work. (DDE 5; Tr. 53-54, 126-28, 147, 154, 393, 419-20.) Thus, the producer's lead rigger will direct the referred riggers, the lead sound technician will direct the referred sound stagehands, the lead lighting technician will direct the referred lighting stagehands, and so on. (Tr. 71-74, 127-28, 147-48, 154.)

Stagehands provide their own basic equipment, such as hard hats, steel-toed boots, and wrenches. (DDE 5; Tr. 42-43, 49, 51-53, 120, 123, 152-53, 169, 260, 416.) Those who work as riggers also provide their own ropes, harnesses, and fall-arresting lanyards. The Company provides all stagehands with reflective safety vests emblazoned with its name, and requires stagehands to wear the vests while at the venues. (DDE 5; Tr. 49-50, 120, 124, 139, 141, 153, 196, 409-10.)

After completion of a job, the Company bills the client and pays the stagehands. It pays most stagehands based on an hourly rate, with a guaranteed minimum of four hours' pay. At certain events, it pays riggers and camera operators a flat daily rate. (DDE 5, 7; Tr. 62, 66, 121-22, 149, 151, 211-12, 227, 283, 412.) The Company determines stagehands' pay rates, setting them in advance then using them to calculate its estimated labor costs when providing clients with price estimates. (DDE 7; Tr. 159-62, 132, 211, 224-26, 228, 258, 272-73, 278, 382-83, 409.) The Company negotiates overtime rates with its clients, on a job-by-job basis. (DDE 5; RX 10 Ex. B, Tr. 135, 164-65, 201-03, 211, 257,

382.) It does not withhold taxes from stagehands' paychecks, and it provides no benefits. (DDE 6; Tr. 41-42, 45, 60, 61-62, 67, 117-18, 120-21, 145-46.) At the behest of its clients, the Company provides workers-compensation insurance, and includes that expense in the price it charges clients. (DDE 7; RX 10, Tr. 52, 80, 257.)

B. Local 927's Hiring Hall

International Alliance of Theatrical Stage Employees Local 927 ("Local 927"), a local affiliate of the Union, operates a hiring hall in the metropolitan Atlanta area that provides labor to businesses in the entertainment industry with which it has collective-bargaining agreements. (DDE 8; RX 3-4, Tr. 295, 315-16.) It has ongoing agreements with several area employers, which regularly contact the local for referrals when they require labor. (DDE 8-9; RX 26-28, Tr. 296-303.) Businesses that are not signatories to an existing agreement, but wish to utilize the hiring hall's services to staff a specific event, must enter into a "one-off" agreement with the local before the hall will refer laborers to them. (DDE 9; RX 30-31, Tr. 303, 309-12.)

Individuals referred by the hiring hall are treated as employees of the company to which they are referred. They are paid by that company, which provides a W-2 tax statement, they receive benefits, and they work under a collective-bargaining agreement. (DDE 9; RX 32, Tr. 318, 320, 331, 366.) There

is an overlap between individuals contained in the Company's stagehand database and those listed on the hiring hall's referral lists. (DDE 9; Tr. 39, 369.)

Local 927 does not actively solicit companies to utilize its hiring hall, and venues or event producers that sign agreements with Local 927 and employ workers referred by the hiring hall do not pay the local a fee for services rendered. (DDE 9; Tr. 316-17, 362.) Local 927 does not realize a profit from operating its hiring hall. (DDE 9; RX 33, Tr. 353.) It generates the funds necessary to operate the hall by requiring non-members to pay an annual fee to participate in its referral program, and by imposing an assessment on the gross wages referred workers earn working any job obtained through the hall. (DDE 9; Tr. 307, 322, 324-25, 334-35, 344-53, 365.)

II. PROCEDURAL HISTORY

A. The Representation Proceeding

On March 17, 2014, the Union filed a petition under Section 9(c) of the Act, 29 U.S.C. § 159(c), seeking to represent a unit of the Company's stagehands. (BDX 1(a).) The Company opposed the petition, contending that: (1) the stagehands were not statutory employees but independent contractors; and (2) the Union had a disabling conflict of interest that precluded it from representing the stagehands because it competed with the Company as a labor provider. On April 23, 2014, after a hearing, the Board's Regional Director issued a Decision and

Direction of Election, finding that the Company had failed to carry its burden of demonstrating either proposition and that the petitioned-for unit was appropriate.² (DDE 3.) The Company requested review of the Regional Director's decision, which the Board (Chairman Pearce and Member Schiffer; Member Miscimarra, dissenting) denied on August 21, 2014. (MSJ Ex. 6.) The Board then conducted a mail-ballot election among the stagehands (MSJ Ex. 3), which the Union won by a vote of 116 to 60. (MSJ Ex. 7.) On September 4, 2014, the Board certified the Union as the collective-bargaining representative of the Company's stagehands. (MSJ Ex. 8.)

B. The Unfair-Labor-Practice Proceeding

On September 8 and 18, 2014, the Union requested that the Company recognize and bargain with it as the stagehands' exclusive representative. (D&O 2; MSJ Ex. 9(a) and (b).) The Company refused. (D&O 2; MSJ Ex. 10.) Based on an unfair-labor-practice charge filed by the Union, the Board's General Counsel issued a complaint alleging that the Company's refusal violated Section 8(a)(5) and

² The unit consists of "All stagehands, including riggers, lighting technicians, audio technicians, stage carpenters, truck loaders, property persons, wardrobe attendants, forklift operators, personnel lift operators, audiovisual technicians, camera operators, spotlight operators and others in similar positions engaged in the loading in, operation, and loading out of equipment used in connection with all live concerts and other events, who are referred for work by [the Company] in the Atlanta metropolitan area, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act." (DDE 14.)

(1) of the Act, 29 U.S.C. § 158(a)(5) and (1), and moved the Board for summary judgment. (D&O 1; MSJ & Ex. 11-13.) The Company opposed the General Counsel's motion, reasserting its challenges based on the stagehands' status and the Union's purported conflict. (D&O 1; Opp'n to Mot. For Summ. J. 1-2.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On January 30, 2015, the Board (Chairman Pearce; Members Miscimarra and Hirozawa) issued its Decision and Order finding that the Company had violated Section 8(a)(5) and (1) as alleged. To remedy that unfair labor practice, the Board's Order requires the Company to cease and desist from failing and refusing to recognize and bargain with the Union or, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights, 29 U.S.C. § 157. (D&O 2.) Affirmatively, the Order directs the Company to bargain with the Union on request, to embody any resulting understanding in a signed agreement, and to post a remedial notice. (D&O 2-3.)

STANDARD OF REVIEW

This Court affords “considerable deference to the Board’s expertise in applying the . . . Act to the labor controversies that come before it.” *Visiting Nurse Health Sys., Inc. v. NLRB*, 108 F.3d 1358, 1360 (11th Cir. 1997). The Court will sustain the Board’s factual findings if they are supported by “substantial evidence on the record considered as a whole.” *Evans Servs., Inc. v. NLRB*, 810 F.2d 1089, 1092 (11th Cir. 1987) (quoting 29 U.S.C. § 160(e)); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-91 (1951). Substantial evidence “means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *NLRB v. Contemporary Cars, Inc.*, 667 F.3d 1364, 1370 (11th Cir. 2012) (quotation marks omitted). In addition, the Board’s reasonable inferences from the evidence will not be displaced even if the Court might have reached a different conclusion had the matter been before it *de novo*. *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428-29 (11th Cir. 1985). Finally, the Court will “defer to the Board’s conclusions of law if they are based on a reasonable construction of the Act.” *Evans Servs.*, 810 F.2d at 1092.

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated the Act by refusing to recognize and bargain with the Union as the certified representative of its stagehands. Although the Company argues that the Board erred in certifying the Union because the stagehands are independent contractors and the Union has a disabling conflict of interest, the Company failed to carry its burden of proving either assertion.

1. Following longstanding precedent, the Board properly applied the multifaceted common-law agency test to find that, on balance, the evidence demonstrated that the stagehands are employees, not independent contractors. Weighing in favor of their status as employees, the Board found that the stagehands perform essential work that is at the core of the Company's regular business as a labor provider, the Company unilaterally dictates the stagehands' pay rates and method of compensation, and the stagehands have little control over their hours, or over the means and manner of their work. Although some factors weigh in favor of independent-contractor status, such as stagehands' ability to reject job offers or work for the Company's competitors, the Board reasonably found those factors insufficient, under the circumstances of this case, to outweigh the factors demonstrating the stagehands' employee status.

2. Substantial evidence supports the Board's finding that Local 927's hiring hall did not create a disabling conflict of interest for the Union. First, the Board found no evidence that the Union controls the hiring hall that purportedly competes with the Company's business. Second, even if the Union operated the hiring hall, the Board found that fact alone would not constitute a disabling conflict of interest under governing jurisprudence because the hiring hall is not a profit-oriented business.

ARGUMENT**SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION**

Section 7 of the Act grants employees the right to choose a representative and to have that representative bargain with their employer on their behalf. 29 U.S.C. § 157. Employers have a corresponding duty to bargain with their employees' chosen representatives, and a refusal to bargain violates that duty under Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1).³ *See NLRB v. U.S. Postal Serv.*, 888 F.2d 1568, 1570 (11th Cir. 1989). Here, the Company does not dispute that it refused to bargain with the Union. Rather, it challenges the validity of the Board's certification of the Union. Unless the Company prevails in that challenge, its admitted refusal to bargain violates Section 8(a)(5) and (1) of the Act, and the Board is entitled to enforcement of its Order. *See Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1260, 1261 & n.1 (11th Cir. 1999).

As the following discussion demonstrates, the Board reasonably found that the Company failed to prove that the stagehands are independent contractors rather

³ A violation of Section 8(a)(5) results in a derivative violation of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights" *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

than statutory employees. And substantial evidence supports the Board's finding that the Union does not have a disabling conflict of interest based on its alleged competition with the Company as a labor provider. Therefore, the Company's refusal to bargain violates the Act.

A. The Board Reasonably Found that the Stagehands Are Statutory Employees

1. Relying on Common-Law Agency Factors, the Board Analyzes the Totality of the Circumstances To Determine Whether a Worker Is an Employee or an Independent Contractor

In 1947, Congress amended the definition of "employee" in Section 2(3) of the Act to exclude certain specific categories of workers, including "any individual having the status of an independent contractor." 29 U.S.C. § 152(3).

Subsequently, the Supreme Court reaffirmed an expansive interpretation of "employee," finding that the term broadly covers those individuals who work for others. *See Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166-68 (1971). Indeed, the Supreme Court has described the breadth of the Act's definition of employee as "striking," noting that the only limitations are enumerated in the Act and that, moreover, the "task of defining the term 'employee' is one that 'has been assigned primarily to the [Board as the] agency created by Congress to administer the Act.'" *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (quoting *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 130 (1944)).

The Supreme Court has also specifically endorsed the "Board's broad, literal

interpretation of the word ‘employee’ [a]s 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) (citations and internal quotations omitted). In accordance with those statutory purposes, the Board narrowly interprets any exemptions from the Act’s protection. *See Bos. Med. Ctr. Corp.*, 330 NLRB 152, 160 (1999); *see also Sure-Tan*, 467 U.S. at 892.

To differentiate between statutory employees and independent contractors, the Board, with court approval, applies common-law agency principles to assess the relationship between the employing entity and the individual performing the work. *See Roadway Package Sys., Inc.*, 326 NLRB 842, 849-50 n.32 (1998); *see also NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968); *NLRB v. Deaton, Inc.*, 502 F.2d 1221, 1223 (5th Cir. 1974).⁴ Accordingly, the Board considers factors such as: the extent of the employing entity’s control over the manner and means of work; whether the individual is engaged in a distinct occupation; whether the individual bears entrepreneurial risk of loss and enjoys entrepreneurial opportunity for gain; whether the employing entity or the individual supplies the

⁴ Decisions of the former Fifth Circuit issued prior to October 1, 1981, are binding precedent for this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

instrumentalities, tools, and place of work; the skill required for the particular occupation; whether the parties believe they are creating an employment relationship; whether the individual's work is part of the employing entity's regular business; whether the employer is in the business; the method or increment of payment, whether by time or by the job; and the tenure of employment. *See CSS Healthcare Servs., Inc.*, 355 NLRB 33, 38 (2010), *affirmed*, 355 NLRB 472, *enforced*, 419 F. App'x 963 (11th Cir. 2011); *Roadway Package Sys.*, 326 NLRB at 849-50 n.32; *see also United Ins.*, 390 U.S. at 256-59 (analysis consistent with agency factors).

The foregoing list of factors is “not exclusive or exhaustive,” *Slay Transp. Co., Inc.*, 331 NLRB 1292, 1293 (2000), and the Supreme Court has recognized that “there is no shorthand formula or magic phrase” that can determine employee or independent-contractor status from one case to another. *United Ins.*, 390 U.S. at 258. That fact-intensive determination requires a case-by-case evaluation of “all of the incidents of the relationship,” with “no one factor being decisive.” *Id.*; *accord NLRB v. Assoc. Diamond Cabs, Inc.*, 702 F.2d 912, 919 (11th Cir. 1983); *Deaton*, 502 F.2d at 1223. In other words, as the Board has explained: “[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 Package Sys.*, 326 NLRB at 850 (quotation marks omitted). Moreover, the burden of proving independent-contractor status by a preponderance of the evidence rests on the party asserting it. *See Argix Direct, Inc.*, 343 NLRB 1017, 1020 (2004); *Better Bldg. Supply Corp.*, 259 NLRB 469, 475 (1981). *See also NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 710-12 (2001) (burden on party urging exclusion from the Act’s protections).

In distinguishing between employees and independent contractors, “Congress empowered the Board 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). Accordingly, the Board’s determination of employee status “should not be set aside merely because the court of appeals would, as an original matter, decide the case the other way. The court must canvass the entire record in the search for substantial evidence and must not displace the Board’s choice between two fairly conflicting views.” *Deaton*, 502 F.2d at 1223. *See also United Ins.*, 390 U.S. at 260 (Board’s finding “should not be set aside just because a court would, as an original matter, decide the case the other way”); *Assoc. Diamond Cabs*, 702 F.2d at 919 (when Board’s finding is supported by substantial evidence, court should not displace Board’s choice

between two fairly conflicting views). “Especially in an area as fraught with technical distinctions and as dependent on factfindings as the employee-independent contractor dichotomy, [a court] should decline to interfere with a Board decision reached through orderly processes under proper legal standards and supported by substantial evidence.” *Deaton*, 502 F.2d at 1228.⁵

2. The Board Reasonably Rejected the Company’s Claim that the Stagehands Are Independent Contractors

In addressing the question of the stagehands’ status, the Board recognized (DDE 7-8) that, as in many cases in which it must determine whether individuals are statutory employees or independent contractors, the record contains evidence both for and against employee status.⁶ The Board reasonably determined (DDE 8), however, that the balance of the common-law agency factors indicated that the stagehands are employees. Specifically, as detailed below, the Board noted that

⁵ There is no merit to the Company’s assertion (Br. 33, 49) that the Board’s findings are entitled to less deference when a member of the Board panel dissents. In any event, the unfair-labor-practice Order under review is unanimous. (D&O 1 & n.2.) And, in the underlying representation proceeding, Member Miscimarra dissented from the Board’s denial of review of the Regional Director’s decision and would have reexamined aspects of the balancing analysis. He did not, as the Company acknowledges (Br. 3, 4), state that he would have found the stagehands to be independent contractors. (MSJ Ex. 6.)

⁶ *See, e.g., Deaton*, 502 F.2d at 1224 (“Nearly every case examining the employee-independent contractor distinction involves an alignment of investment and management responsibility departing in some degree from the classic employer-salaried employee model. The various factors bearing on the ‘total situation’ frequently point in conflicting directions.”).

facts relating to three important factors combine to support a finding of employee status: (1) the stagehands' work is essential to the Company's regular business; (2) the Company dictates their rate and method of compensation; and (3) the stagehands have little control over their hours of work. The Board further found that, while some other factors tend to show independent-contractor status, they were insufficient, under the circumstances of this particular case, to outweigh the combined indicators of employee status. Accordingly, the Board reasonably found that the Company had not met its burden of establishing independent-contractor status.

a. The nature of the stagehands' work, at the core of the Company's regular business, supports finding them to be statutory employees

The Board reasonably weighed in favor of employee status (DDE 7) the fact that the stagehands' work is essential to, and indistinguishable from, the Company's regular business. As an initial matter, substantial evidence supports the Board's factual finding to that effect. As the evidence shows, the Company is solely engaged in the business of providing labor to event producers and, pursuant to the Company's labor contracts with those producers, the stagehands set up, take down, and staff the events. (RX 11, Tr. 25-27, 30, 53-54, 58, 88, 122-23, 126-28, 147, 151, 154-55, 373-75, 393, 400, 419-20.) Additionally, no other individuals perform such work on behalf of the Company. (Tr. 26, 253.) Consequently,

without the stagehands' work, the Company could not operate as a labor provider, its *raison d'être*. That its admitted clerical and management employees perform duties different from those of the stagehands does not detract from the central role the stagehands play in its business.⁷

Legally, the Board legitimately considers, in its independent-contractor analysis, whether an individual's work is core to the employer's normal business operations. *See United Ins.*, 390 U.S. at 258-59 (considering as one "decisive" factor that employees' functions were "essential part of the company's normal operations"); *Slay Transp.*, 331 NLRB at 1294 (same); *Roadway Package Sys.*, 326 NLRB at 851 (same).⁸ As the District of Columbia Circuit explained, a "company more likely than not would want to exercise control over such important

⁷ Similarity of duties between admitted employees and workers may, as the Company notes (Br. 44), support finding the latter to be employees. *See, e.g., NLRB v. Silver King Broad. of S. Cal., Inc.*, 85 F.3d 637 (9th Cir. 1996), 1996 WL 253847, at *2; *NLRB v. Warner*, 587 F.2d 896, 901 (8th Cir. 1978). But the Company provides no support for its assertion (Br. 44) that the *dissimilarity* of its admitted employees' and the stagehands' duties supports finding the stagehands to be independent contractors. Many companies employ several categories of statutory employees with distinct sets of duties or different pay and benefit packages.

⁸ In *Associated Diamond Cabs*, this Court described the Board's finding respecting the nature of employees' work as irrelevant, noting that some decisions have found independent-contractor status despite workers performing essential functions. 702 F.2d at 924. But that fact is consistent with the Board's consideration and balancing of all agency factors in each case, with no one being dispositive, an approach established by controlling precedent. *See supra* pp. 17-19 (citing, *inter alia*, *United Ins.*, *CSS Healthcare, Assoc. Diamond Cabs, Deaton*).

personnel.” *Aurora Packing Co. v. NLRB*, 904 F.2d 73, 76 (D.C. Cir. 1990).

Accordingly, where a worker performs duties that are essential to, and indistinguishable from, an employer’s regular business, the Board will find that the factor weighs in favor of employee status. For instance, in *Slay Transportation*, the Board cited, as a factor weighing in favor of employee status, that owner-operators’ work driving trucks carrying chemicals was at the core of the employer’s regular business of transporting chemicals. 331 NLRB at 1294.

Similarly, in *BKN, Inc.*, it weighed script writers’ essential role in the employer’s normal operations of producing a television series in favor of employee status. 333 NLRB 143, 145 (2001); *see also Roadway Package Sys.*, 326 NLRB at 851 (citing substantial amount of time, labor, and equipment drivers devoted to performing the employer’s regular and essential business of delivering packages). Conversely, the Board found that the nature of models’ work posing, distinct from and tangential to the employer’s business of providing instruction to art students, weighed in favor of an independent-contractor determination. *Pa. Acad. of the Fine Arts*, 343 NLRB 846, 847 (2004).

The Company incorrectly suggests (Br. 43-45) that the Board erred by basing its analysis on the nature of the stagehands’ work to the exclusion of all else. In fact, as both the Company’s cases and Board precedent require, the Board considered this factor along with all relevant factors weighing both for and against

employee status, examining the totality of the circumstances under its multi-factor agency test. Given the integral role of the stagehands' functions in the Company's business, the Board properly determined that this factor supports a finding of employee status, in conjunction with the other factors discussed below.

b. The Company's methods for determining the stagehands' pay weigh in favor of employee status

The Board also properly found (DDE 7) that the Company's unilateral determination of the stagehands' pay rates, and its bases for calculating their compensation, both weigh in favor of finding the stagehands to be employees. As detailed below, those related common-law factors bear on a worker's status as an employee, and substantial evidence supports the Board's factual findings that the stagehands' compensation was effectively both non-negotiable and hourly. Those same factors, moreover, undermine the Company's assertion that its relationship with the stagehands provides them with any significant entrepreneurial opportunity or risk that might suggest that they are independent contractors.

i. The Company unilaterally sets stagehands' pay rates

The Board has held that when an employer unilaterally sets workers' compensation rates, rather than negotiating them with the workers, such control over compensation weighs in favor of finding the workers to be employees.⁹ *Time*

⁹ The Company's argument that disparity in negotiating power does not suggest control is inapposite. *See* Br. 42 (citing *Assoc. Diamond Cabs*, 702 F.2d at 921,

Auto Transp., Inc., 338 NLRB 626, 637 (2002), *enforced*, 377 F.3d 496 (6th Cir. 2004); *Slay Transp.*, 331 NLRB at 1294; *Roadway Package Sys.*, 326 NLRB at 852. Here, ample evidence supports the Board's finding (DDE 7) that the Company unilaterally determines stagehands' pay. The Company sets hourly rates and thereafter stagehands have little to no meaningful opportunity to negotiate for higher rates; a stagehand must accept the Company's announced rates to secure work.¹⁰ (Tr. 62, 66, 121-22, 132, 149, 151, 159-62, 211-12, 224-28, 258, 278, 283, 382-83, 409, 411-12.) Indeed, the Company's questionnaire has no place for stagehands to request a specific hourly rate, and the Company keeps no evidence of wage negotiations. (RX 5, Tr. 258.)

In arguing (Br. 41) that stagehands actually negotiate their pay rates, the Company greatly overstates the import of the relevant evidence. First, it overemphasizes stagehand Tucker's request for a higher rate, the only concrete example it cites of a stagehand directly negotiating his hourly rate. Tucker actually testified that the Company unilaterally set his initial rate, rebuffing his attempt to negotiate, and told him when to ask for an increase (each month). When the

and *NLRB v. A. Duie Pyle, Inc.*, 606 F.2d 379, 386 (3d Cir. 1979)). The Board did not suggest that a disparity in negotiating power factored into its factual finding that there was insufficient evidence of pay negotiations.

¹⁰ The Company sets the pay-rate ranges for each classification (e.g., \$9-14 for stagehands, \$25-34 for riggers). (Tr. 272-73.) There is no evidence in the record regarding how it then determines a particular stagehand's rate within the applicable range.

Company subsequently decided to grant him a raise, it did so at its sole discretion and not pursuant to negotiations. (Tr. 382-83.) Second, the testimony of the Company's General Manager, that some riggers and cameramen are paid daily rather than hourly, proves little with respect to the negotiability of stagehands' compensation generally. It relates only to a fraction of the stagehands in the Company's database,¹¹ and the evidence shows that the Company unilaterally determined that the rigger and cameraman classifications—and only those two—warrant a day rate in certain cases. Moreover, even as to those classifications, the Company decides when day rates will apply, often based on the venue or the client. There is no specific evidence that the Company actually negotiates with individual stagehands when deciding whether the day rate will apply to a given event. (Tr. 212-13, 283, 411-12.)¹² Nor is it clear that any particular stagehand always receives a day rate regardless of the event he works, as opposed to all stagehands being eligible to receive the day rate if they work in a qualifying classification at events the Company has designated as warranting daily pay. Accordingly, substantial evidence supports the Board's finding that the stagehands cannot

¹¹ Thus, for example, although it trumpets that 30 percent of riggers (roughly 10 to 15 individuals (Tr. 227)) are paid by the day rather than by the hour, that is roughly 10-15 percent of the Company's approximately 475 stagehands. (Tr. 226-27.)

¹² Similarly, although the Company cites (Br. 40) its payment of higher hourly rates for corporate events, it points to no evidence suggesting that the stagehands play any role in setting those higher rates.

negotiate their wage rate, and the Board thus reasonably weighed that inability to negotiate in favor of finding the stagehands to be employees.

ii. The Company’s method of calculating compensation approximates an hourly wage

Like inability to negotiate pay, a method of calculating compensation based on the number of hours worked indicates an employer-employee relationship. *CSS Healthcare Servs.*, 355 NLRB at 39; *accord Lancaster Symphony Orchestra*, 357 NLRB No. 152, 2011 WL 6808002, at *8 (2011), *petition and cross-application filed*, Nos. 14-1247 & 14-1272 (D.C. Cir.) (briefing complete). By contrast, a flat fee for services rendered tends to demonstrate a worker’s status as an independent contractor because he can effectively increase his pay rate by completing the job more efficiently. *Capital Parcel Delivery Co.*, 269 NLRB 52, 54 (1984). For example, the Board, with court approval, found that a behavior specialist’s status as an employee was illustrated by her employer’s calculation of her pay on an hourly basis. *CSS Healthcare Servs.*, 355 NLRB at 39, *enforced*, 419 F. App’x 963 (11th Cir. 2011). Conversely, the Board has found evidence of independent-contractor status where, among other things, drivers—formerly paid on an hourly basis—were paid on a per-stop basis, an inducement to work more efficiently. *Capital Parcel Delivery*, 269 NLRB at 54; *see also Young & Rubicam Int’l, Inc.*, 226 NLRB 1271, 1276 (1976) (employer compensating photographers with flat fee per assignment was of “great significance” in finding independent-contractor

status); *Am. Broad. Co.*, 117 NLRB 13, 16, 18 (1957) (composers' status as independent contractors indicated by flat-fee payment rather than "a weekly or hourly rate").¹³

Substantial evidence supports the Board's finding (DDE 7) that the Company's compensation scheme is based on, or approximates, an hourly rate. The Company indisputably (Br. 39) maintains hourly rates for each stagehand classification, pays the vast majority of stagehands on an hourly basis, and provides hourly overtime pay under several scenarios. (Tr. 62, 66, 201-03, 211, 227-28, 272-73, 411-12.) Although the Company highlights (Br. 40) that the stagehands can increase their earnings by, for example, working 10-hour days or on holidays, the Company's provision of overtime or premium pay under such circumstances actually reinforces the Board's finding that its method of compensation approximates that of a traditional employer-employee relationship.

¹³ The Company's reliance (Br. 40) on *Hilton International Co. v. NLRB*, 690 F.2d 318, 322 (2d Cir. 1982), and *Associated General Contractors of California, Inc. v. NLRB*, 564 F.2d 271, 280 (9th Cir. 1977), is misplaced. Finding that employee-musicians' employers were their band leaders, not the hotels where the bands played, the court in *Hilton International* discounted the fact that the hotels paid the musicians directly. Although the court noted that the payments were calculated from a "lump-sum amount" in the bands' contracts based on musician hours, it did not discuss the import of that time-based calculation. In *Associated General Contractors*, the Court found that, although the truck owner-operators' hourly compensation would usually indicate employee status, it did not when the payments were at least as much an equipment rental fee (for the use of their trucks) as wages for labor. 564 F.2d at 280, 282 (contrasting situation of employee-drivers, paid on straight hourly basis).

Cf. Constr., Bldg. Material, Ice & Coal Drivers, Helpers & Inside Emps. Union, Local No. 221 v. NLRB, 899 F.2d 1238, 1242 (D.C. Cir. 1990) (although paid hourly like employees, truck owner-drivers did not receive overtime, distinguishing them and showing status as independent contractors).

The Company's assertion (Br. 39) that the stagehands are paid strictly by event because they work on an event-by-event basis is belied by the foregoing evidence that the Company pays the vast majority of stagehands (all, at some events) on an hourly basis, and provides overtime under various scenarios. For those reasons its reliance (Br. 39) on *Janette v. American Fidelity Group, Ltd.*, 298 F. App'x 467 (6th Cir. 2008), is misplaced. There, the court found that a worker was an independent contractor where, unlike here, she was paid a straight, flat fee per project. *Id.* at 475.

Nor is there any merit to the Company's reliance (Br. 39-40) on its four-hour-minimum pay policy. That policy does not negate the basic, hourly foundation of the Company's pay calculations. Moreover, to the extent the four-hour minimum may distort the hourly basis under certain circumstances, that fact is less probative of employee status in light of the record evidence, and the Company's concession (Br. 7, 39-40), that the policy is standard industry practice. *See infra* p. 44. And, finally, the stagehands' lack of control over their start and

stop times, *see infra* pp. 36-38, undermines the Company's claim (Br. 40) that they can control their "effective pay rate" by completing their work in under four hours.

iii. The Company has not demonstrated that the stagehands enjoy true entrepreneurial risk and opportunity

The Board's foregoing findings, which weigh in favor of employee status for the stagehands, also undermine the Company's argument (Br. 45-47) that the stagehands possess the sort of entrepreneurial risk and opportunity that supports a finding of independent-contractor status. Entrepreneurial risk and opportunity exist when workers can modify the terms of their work to their economic advantage or take financial risks to achieve greater profits; it does not exist where the worker's compensation is not dependent on, or influenced by, the manner of his performance. *See Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 779 (D.C. Cir. 2002) (recognizing that an entrepreneur "takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder"); *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1098 (9th Cir. 2008) (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); *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").

For example, the Board found the drivers in *Dial-A-Mattress* 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. *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 891-92 (1998). Conversely, the Board found script writers had no entrepreneurial opportunity because they "[we]re paid the per script fee set by the Employer and [] ha[d] no ability to increase their compensation through the exercise of discretion in how they perform their work." *BKN*, 333 NLRB at 145. Similarly, a behavior-specialist "bore none of the risk inherent in an entrepreneurial enterprise" where she was not "paid a fee based on the success of her efforts, [but instead] paid, hourly, for the work she performed." *CSS Healthcare Servs.*, 355 NLRB at 35. *See also DIC Animation City*, 295 NLRB 989, 990 (1989) (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"). *Accord Lancaster Symphony Orchestra*, 2011 WL 6808002, at *7 ("[t]he choice to work more hours or faster does not turn an employee into an independent contractor").

The stagehands display none of the hallmarks of entrepreneurial opportunity or risk. To the contrary, as shown, the Company unilaterally sets their pay rates without negotiation and their performance at an event, regardless of how well or poorly it is executed, has absolutely no bearing on their pay. Moreover, once stagehands accept a job offer from the Company, they have no control over their hours or schedules. *See infra* pp. 36-38. In other words, unlike the entrepreneurs discussed in *Corporate Express*, *Dial-A-Mattress*, *DIC*, and similar cases, the stagehands here cannot profit from working “smarter”—essentially, they can only increase their income by working more.¹⁴ Thus, there is no merit to the Company’s contention (Br. 45) that, because the stagehands choose the events they work, they enjoy entrepreneurial freedom analogous to workers classified as independent contractors.¹⁵

¹⁴ The courts’ analyses in the cases cited by the Company (Br. 45-47), are not to the contrary. *See, e.g., FedEx Home Delivery v. NLRB*, 563 F.3d 492, 498-99 (D.C. Cir. 2009) (court cited evidence drivers contract for multiple routes, operate own businesses, hire own employees, and have sole right to assign route contracts); *SIDA of Haw., Inc. v. NLRB*, 512 F.2d 354, 357 (9th Cir. 1975) (court cited evidence drivers made substantial investments in their cabs and were largely independent from employer, an administrative entity that did not compensate them).

¹⁵ Although the Company also asserts (Br. 46-47) that stagehands sometimes provide substitutes if they cannot work an event they committed to work, and that some are incorporated (at least for payment purposes) as separate businesses, the limited testimony does not establish that either represents a systematic effort by stagehands to generate entrepreneurial opportunities, and it is unclear how they

That stagehands may work for other labor providers does reflect some level of entrepreneurialism, as the Company emphasizes (Br. 45) and the Board acknowledged (DDE 7). But the significance of that fact is, in this case, a consequence of the part-time nature of stagehand work.¹⁶ Indeed, like the animation industry in *BKN*, the stagehand 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. Part-time and casual employees are covered by the Act, even when they work for more than one employer. *See KCAL-TV*, 331 NLRB 323, 323 (2000) ("Quite obviously, an individual who works parttime for more than one employer may be eligible to vote in an appropriate unit of each employer's employees."). In fact, the Board has accommodated the intermittent working patterns in certain industries by establishing special eligibility formulas to determine when workers with such schedules may vote in representation elections,

would. Indeed, as the Company admits (Br. 46), it discourages stagehands from using substitutes in order to take a more profitable job elsewhere. (Tr. 267-69.)

¹⁶ The Company's cases (Br. 46) respecting this factor do not undermine the Board's assessment. In *Hilton International*, for example, the court found that band leaders were independent contractors, rather than supervisory employees of the hotels where the bands performed. 690 F.2d at 322. The fact that the leaders sometimes arranged other gigs for the bands was just one of many factors the court found demonstrated their independent-contractor status, including the court's determination that they were the band musicians' employers. *Id.*; *see also supra* note 13.

rather than categorically excluding them from the Act's coverage by classifying them as independent contractors. *Kan. City Repertory Theatre, Inc.*, 356 NLRB No. 28, 2010 WL 4859825, at *1 (2010) (“Although the employees in the petitioned-for unit work intermittently, in many industries employees with little or no expectation of continued employment with a particular employer engage in stable and successful collective bargaining—for example, actors and construction workers, to name just two such groups.”)

Accordingly, the Board reasonably found that the Company's hourly basis for computing compensation, like the stagehands' inability to negotiate their pay rates weighs in favor of finding the stagehands to be employees.

c. The stagehands' lack of control over their hours, or work, supports finding them to be employees

The Board also reasonably found (DDE 7-8) that the stagehands' lack of control over their work hours favored finding them to be employees rather than independent contractors. The Board acknowledged that the stagehands' ability to accept or reject the Company's offer to work any given event supports independent-contractor status, as the Company asserts (Br. 37-38). But it found that fact outweighed by the Company's control over—and monitoring of—the stagehands' hours once they choose to work an event. That analysis is both legally and factually supported. Moreover, the same rationale undermines the Company's

broader argument that it does not control the means and manner of the stagehands' work.

Whether an employer controls aspects of an individual's work is an important common-law factor. *Assoc. Diamond Cabs*, 702 F.2d at 919; *Deaton*, 502 F.2d at 1223. It is not, however, the single predominant factor. *Assoc. Diamond Cabs*, 702 F.2d at 919; *Roadway Package Sys.*, 326 NLRB at 850. An employee's work is typically supervised. *The Comedy Store*, 265 NLRB 1422, 1438 (1982) ("Employees' work for wages or salaries under direct supervision.") (citation omitted). By contrast, a worker's freedom to perform tasks or accomplish a desired result according to his own methods or timetable, or even to subcontract the work to another, are hallmarks of independent contractors. *Id.*; see, e.g., *Pa. Acad. of the Fine Arts*, 343 NLRB at 847 (putative employer did not supervise models, who had discretion to achieve desired "look" using any particular pose); *Dial-A-Mattress*, 326 NLRB at 892 (putative employer did not directly supervise owner-operator drivers, who worked away from warehouse; some owner-operators also subcontracted to, and closely controlled, their own drivers). That dichotomy is true with respect to work hours, among other terms and conditions of employment. Compare *Lancaster Symphony Orchestra*, 2011 WL 6808002, at *6 (although musicians made yearly decision whether to work for orchestra and for what programs, once they agreed to do so they lost control over their work time,

illustrating status as employees), *with Assoc. Diamond Cabs*, 702 F.2d at 916, 921 (court emphasized that cab drivers could work as many or few hours as desired once they paid flat dispatch fee).

i. The Company controls the stagehands' hours

The Company's monitoring and control of the stagehands' hours supports employee status. As the Board found (DDE 7), once stagehands accept the Company's offer to work an event, the Company asserts a right at that point to require them to do so, warning in its orientation packet that if a stagehand is not onsite and prepared to work at the appointed time, he is "at risk of being dismissed" by its client. (RX 8 p. 15; *see also* Br. 27 (stagehand obligated to work event once accepts offer).) The Company dictates that start time—directing them to arrive 30 minutes prior to the client's scheduled start time, monitors and maintains their work hours, and requires them to sign in and out with its onsite project coordinator. Just as they are directed when to arrive, the stagehands are told when they are finished and when they may leave. (Tr. 55, 67-69, 76, 125-26, 134-37, 139, 162-64, 164, 384, 386-87, 393, 410-11.) Moreover, the record indicates that the stagehands must, as the Company concedes (Br. 37), work entire events—they cannot commit to work only an event's unloading and set-up, for example. (Tr. 59, 68, 117, 386, 398.)

Those circumstances differ from a true independent-contractor relationship where, even after the worker enters into a relationship with, or accepts work from, the employer, he often remains free to work or not work without restriction or punishment. *Compare Dial-A-Mattress*, 326 NLRB at 887, 891 (independent-contractor status of owner-operators of trucks demonstrated by evidence that, after contracting with retailer to deliver mattresses, they could decline to show up on scheduled workday and refuse deliveries without repercussion), *and Assoc. Diamond Cabs*, 702 F.2d at 916, 921, *with Roadway Package Sys.*, 326 NLRB at 844, 852 (drivers were employees where, *inter alia*, employer required them to provide delivery services on scheduled workdays, subject to termination for failure to do so).¹⁷ By contrast, such lack of worker autonomy with respect to hours of work, and employer monitoring of the same, is accepted evidence demonstrating a worker's status as an employee. *See, e.g., Seattle Opera v. NLRB*, 292 F.3d 757, 765 (D.C. Cir. 2002) (auxiliary choristers were employees, in part, because they were required "to sign in when they arrive, on time, at each and every rehearsal

¹⁷ The Company incorrectly claims (Br. 31-32) that dictating stagehands' arrival time "does not amount to control," citing *Collegiate Basketball Officials Ass'n, Inc. v. NLRB*, 836 F.2d 143, 147 (3d Cir. 1987). There, the court explained that, although control over hours normally weighs in favor of employee status, it did not under the unusual facts of that case. It emphasized that the highly skilled nature of the position (basketball referees) combined with a risk of game-time no-shows to create a very particular "difficulty of substitute performance." *Id.* Because many stagehands are skilled in several types of work, the failure of one stagehand to show is mitigated by the presence of the others. (RX 13, Tr. 143, 147, 116.)

and performance”); *NLRB v. Amber Delivery Serv., Inc.*, 651 F.2d 57, 62, 63 (1st Cir. 1981) (drivers employees where, *inter alia*, they were required to arrive for work at specific time or report their location to employer at set time); *Slay Transp.*, 331 NLRB at 1293 (owner-operator drivers employees where, *inter alia*, they were specifically instructed when to be available). Accordingly, the Board reasonably found that the Company’s control over the stagehands’ work hours weighed in favor of finding them to be employees.¹⁸

ii. The Company’s broader claim that it does not control the stagehands’ means or manner of work is contrary to the facts and to the Board’s analysis

Like its argument with respect to the stagehands’ hours, the Company’s broader claim (Br. 26-35) that it neither has the right to, nor factually does, control the stagehand’s means and manner of work places undue emphasis on one fact (in this case, the client’s role) and disregards other material facts. Contrary to the Company’s assertions, the logic the Board applied when analyzing the stagehands’ hours—considering the totality of the circumstances—extends to other aspects of their jobs.

¹⁸ The Company’s citation (Br. 32) to *Hilton International*, 690 F.2d at 321, is not to the contrary. The Court in that case found that band musicians were not hotel employees despite the hotel’s control over performance times; musicians were, instead, employees of their band leaders, who scheduled and conducted rehearsals. *Id.* (band leaders also hired and fired musicians, approved their leave, selected the band’s instruments, music, and other standards of performance, and instructed and disciplined the musicians).

To begin, before stagehands are even eligible to work an event, the Company distributes a packet at its orientation sessions containing detailed policies and procedures that they must follow to obtain work and while working. (RX 8, Tr. 47, 55, 57, 65, 192-93.) In its packet, the Company provides specific instructions stagehands must follow to accept or reject work. Thus, the Company informs stagehands that there is a strict deadline for responding “yes” or “no” to particular events, with the warning that “[i]f we see a pattern of not responding, we will assume you are no longer interested in being offered the work and replace you on our call list,” depriving the stagehand of any future offers. (RX 8 p. 15.) If a stagehand is unable to work an event that they agreed to work, they must notify the Company by “PHONE CALL” at least 24 hours in advance, because “email is NOT acceptable for cancellations.” (RX 8 p. 15.) The Company also instructs stagehands on what to wear (“presentable and comfortable clothing. Shorts or pants are fine.”); what to do if they are injured (“you must tell your Project Coordinator of your injury – when it happens.”); how to act around artists (“Do not converse with artists, take pictures, or approach them at any time This behavior is not tolerated or permitted in any way.”); what tools to bring; how to handle unpleasant tour personnel (“Do not let their attitudes bother you. Listen to what they say and please do not do anything unless they ask you to Please

keep quiet and ask questions when necessary.”); and other minutia.¹⁹ (RX 8 p. 15.)

The Company’s detailed procedures and rules for accepting work and guidelines for behavior and dress properly constitute evidence of control. *See, e.g., Friendly Cab*, 512 F.3d at 1101 (dress); *Corporate Express Delivery Sys.*, 332 NLRB 1522, 1522 (2000) (dress), *enforced*, 292 F.3d 777 (D.C. Cir. 2002); *Elite Limousine Plus, Inc.*, 324 NLRB 992, 1000 (1997) (dress and behavior; detailed and stringent procedures for cab drivers to accept fares). *See also Assoc. Diamond Cabs*, 702 F.2d at 921-22 (though it found employer’s requirement that drivers be “neat and clear” vague, court agreed with Board that it still evinced a degree of control).²⁰

Moreover, while the Company ostensibly abstains from dictating the means and manner of the stagehands’ performance of their duties during each event beyond imposition of the work rules just discussed, the details of their work are—as the Company asserts (Br. 28)—closely monitored and directed by supervisors who run the departments to which the Company specifically assigns each

¹⁹ The Company also imposes a requirement that stagehands wear a safety vest with its logo, though the Board did not rely on that fact in its analysis (DDE 5-8), contrary to the Company’s suggestion (Br. 34-35).

²⁰ The Company’s cited (Br. 32) cases are not to the contrary. *See Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366, 380 (D.C. Cir. 1983) (court found bulletin board notices that served as reminders of government regulations and standards of conduct did not evidence control where they benefitted drivers as much as employer and drivers were not punished for violating them); *SIDA*, 512 F.2d at 359 (court found employer’s rules did not evidence of control where they merely reiterated government regulations or addressed general standards of conduct that benefitted drivers as much as employer).

stagehand. After arriving at a venue, the Company's project coordinator generally "departmentalizes" stagehands into specific classifications. (Tr. 53-54, 67, 76, 125-28, 134, 147, 154, 164, 200, 218-19, 385-86, 393, 410, 419-20.) By departmentalizing the stagehands, many of whom are qualified to perform more than one category of stagehand work, the Company controls the fundamental manner of their work: it dictates the type of stagehand labor they will perform. For instance, as stagehand Tucker explained, although he is skilled at lighting and prefers to perform lighting work, the Company often assigns him to carpentry, a less desirable category of work compensated at a lower rate. (Tr. 385-86.)

Further, once departmentalized, the stagehands work for the duration of the event under close supervision—not as they see fit, in the exercise of their specialized skills. For example, as detailed in the record, the client's lead rigger directs stagehands departmentalized as riggers in all of their work hanging lights, speakers, and video screens from a venue's ceiling. (Tr. 147-49, 154, 419-20.) Likewise, a stagehand that loads and unloads trucks must follow tour personnel's instructions when unloading, moving, and assembling equipment. (Tr. 127-28.) In other words, as the Company asserts (Br. 28), the producer's personnel are the stagehands' "boss for the day," a job expectation that the Company communicates explicitly to its stagehands. (RX 8 p. 3.)

Under those circumstances, the Company's assertion (Br. 30) that it merely "connects" stagehands with event producers, but it does not exercise any control over the means and manner of their work, proves too much. As shown, the Company mandates that stagehands adhere to certain general policies at all events, and departmentalizes stagehands to perform a particular type of work at particular events, for, and under the direction of, supervisors. The Company is not, as in true independent contractor cases, giving the stagehands broad tasks to accomplish as they choose, in the time and manner they desire. *Cf. supra* pp. 30-34 (discussing stagehand's lack of entrepreneurial risk and opportunity). Instead, their work must be done according to detailed instructions, how and when the supervisor dictates, and until the supervisor declares the job satisfactory and completed. The Company does not contend that a stagehand who performed his work as he saw fit, regardless of the client's direction, would have provided the service the client purchased from the Company or the work the Company hired him to perform.²¹

²¹ It is not unheard-of for one employer to lend an employee to another. The law recognizes, for example, the concept of "borrowed employees," "whose services are, with the employee's consent, lent to another employer who temporarily assumes control over the employee's work." *Interstate Fire & Cas. Co. v. Wash. Hosp. Ctr. Corp.*, 758 F.3d 378, 384 (D.C. Cir. 2014) (quotation marks and citation omitted); Restatement (Second) of Agency § 227 (1958). As a comment to the Restatement of Agency clarifies, "[i]n the absence of evidence to the contrary, there is an inference that the actor remains in his general employment so long as, by the service rendered another, he is performing the business entrusted to him by the general employer. There is no inference that because the general employer has

The stagehands' lack of control over the means and manner of their work is analogous to levels of supervision cited by the Board in classifying other workers as employees. *See, e.g., BKN*, 333 NLRB at 144-45 (freelance script writers were employees where, among other things, they were closely supervised and had no control over process of writing scripts); *Slay Transp.*, 331 NLRB at 129 (owner-operator drivers were employees where, among other factors, they were specifically instructed how to do their work and where to do it). *See also Seattle Opera*, 292 F.3d at 765 (auxiliary choristers were employees where they lacked any control over "the material details of their performance"). Just as compelling, the constant monitoring and direction of the stagehands' work contrasts with the type of autonomy that often characterizes, and is cited as supporting, independent-contractor status. *See, e.g., Pa. Acad. of the Fine Arts*, 343 NLRB at 847 (models hired to pose, but had discretion to choose specifics of pose, props, and wardrobe); *Dial-A-Mattress*, 326 NLRB at 891-93 (after owner-operator drivers contracted with retailer to deliver mattresses, their subsequent work was not controlled by retailer). The cases the Company cites (Br. 30) in discussing control do not compel a different result because, unlike here, they did not involve close, in-person

permitted a division of control, he has surrendered it." Restatement (Second) of Agency § 227 cmt. b (1958).

monitoring and supervision of the details of the workers' performance of their duties.

Accordingly, the Board reasonably found that the stagehands' lack of control over their hours supported finding them to be employees. Moreover, its rationale with respect to the hours demonstrates why the Company's broader control argument does not, under the particular circumstances of this case, dictate a finding that the stagehands are independent contractors.

d. The factors supporting independent-contractor status are insufficient to overcome the weight of the evidence demonstrating that the stagehands are employees

The Board reasonably determined (DDE 7) that, under the particular circumstances of this case, the remaining common-law agency factors did not outweigh the factors supporting employee status to compel a finding that the stagehands are independent contractors.

While the stagehands provide their own equipment, the Board found (DDE 7-8) that indicator of independent-contractor status lessened because they do so as part of a common industry practice. *See, e.g., BKN*, 333 NLRB at 144-45 (although writers worked out of their homes and were paid on project-by-project basis, those facts were not compelling indicators of independent-contractor status

because they were industry norms).²² In addition, the Board reasoned (DDE 7-8), consistent with established case law, that the Company's failure to provide benefits to the stagehands or to withhold taxes from their paychecks was not significant in light of the combined factors demonstrating employee status. *See, e.g., Seattle Opera*, 292 F.3d at 763 n.8 (tax treatment is "of little analytical significance" in determining Section 2(3) employee status); *Roadway Package Sys.*, 326 NLRB at 854 (evidence drivers had no benefits and employer did not withhold taxes outweighed by other evidence of employee status); *S. 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."). *Cf. J. Huizenga Cartage Co. v. NLRB*, 941 F.2d 616, 620 (7th Cir. 1991) ("[I]f an employer could confer independent contractor status through the absence of payroll deductions there would be few employees falling under the protection of the Act."); *Igramo Enter.*, 351 NLRB 1337, 1345 (2007) ("To the extent that the Respondent has failed to make deductions . . . it merely demonstrates that the [employer] is probably violating a substantial number of other Federal and State

²² In its brief (Br. 36-37), the Company does not challenge the Board's determination that this factor weighs less heavily in favor of independent-contractor status because it is common industry practice for stagehands to provide their own tools.

laws.”), *enforced*, 310 F. App’x. 452 (2d Cir. 2009).²³ Indeed, an employer’s decision not to provide benefits or withhold taxes could be viewed as merely a self-interested consequence of its assertion that its workers are independent contractors.

Moreover, although the Board acknowledged (DDE 7) that the independent-contractor agreements the stagehands sign weigh in favor of independent-contractor status, it reasonably found (DDE 7, 8) their significance undercut by the evidence demonstrating that the Company required them to sign before it would offer them work.²⁴ (Tr. 63, 420.) The Board did not, contrary to the Company’s suggestion (Br. 48-49), discount the probative value of the agreements based on a disparity of negotiating power. But to assert that the agreements provide a meaningful statement of the stagehands’ (as opposed to the Company’s) conception of their relationship is not as persuasive under those circumstances, and

²³ Although the Company stresses (Br. 42-43) that other agencies have decided that the stagehands are not employees, those determinations are based on different statutory schemes and are not controlling in the context of federal labor law. *See City Cab*, 628 F.2d at 266 n.10 (IRS determination not controlling “in light of statutory policies different from those of the” Act); *see also Collegiate Basketball Officials*, 836 F.2d at 147 (the “private, advisory ruling of a tax agency has little influence on this labor issue”).

²⁴ Contrary to the Company’s suggestion (Br. 49), Member Miscimarra did not, in his dissent, opine that the independent-contractor agreements were dispositive or that their significance could not be lessened under certain circumstances. He simply questioned whether they had been considered. (MSJ Ex. 6.) As the Board majority found (MSJ Ex. 6), the Regional Director explicitly accounted for the agreements in his balancing analysis.

elevates the formality of the contract's language over the substance of the stagehands' experience. In any event, the case law does not support finding a mandatory agreement defining a worker as an independent contractor to be determinative of the worker's status, which is dependent on the totality of his relationship with his employer. *See, e.g., City Cab*, 628 F.2d at 263 (cab drivers were employees, despite having signed contract stating that parties did not intend to create employment relationship); *Time Auto Transp.*, 338 NLRB at 639-40 (although employer required drivers to sign independent-contractor agreement, weight of factors showed drivers were employees); *Corporate Express Delivery Sys.*, 332 NLRB at 1524, 1527 (owner-operators of delivery trucks were employees, despite their independent-contractor agreements).

Finally, the Company's argument (Br. 35-36) that the stagehands' technical skills demonstrate that they are independent contractors is without merit. It focuses only on those specialized categories of stagehands that perform highly skilled labor, such as rigging or pyrotechnics, while ignoring the unskilled bread-and-butter of stagehand labor: loading, unloading, and assembling equipment. (Tr. 116-117, 128, 133, 272-73.) And, more fundamentally, many skilled workers, often highly specialized in their fields, are employees covered by the Act. *See, e.g., Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, 2011 WL 7121890, at * (2011) (various technicians in radiological labs at manufacturer of

nuclear-powered vessels), *petition and cross-application filed*, Nos. 14-2051 & 14-2148 (4th Cir.) (briefing complete); *Metro. Opera Ass'n*, 327 NLRB 740 (1999) (solo singers, principal dancers, members of the corps de ballet, and choristers, possessing “unique” skills); *San Juan Reg'l Med. Ctr.*, 307 NLRB 117 (1992) (biomedical technicians); *Am. League of Prof'l Baseball Clubs*, 180 NLRB 190 (1969) (baseball umpires).

In conclusion, after conducting a careful examination of all the common-law agency factors, as dictated by longstanding Board and court precedent, the Board reasonably found that “although the record reflects the presence of some factors demonstrating independent contractor status, those factors are insufficient to meet the [Company’s] burden of establishing such status where, as here, there are other more compelling factors supporting a finding that the [stagehands] are employees.” (DDE 8.) The Board’s decision is grounded in substantial evidence and consistent with governing case law. At most, the Company may have shown that classification of the stagehands as employees constitutes a reasonable choice between two fairly conflicting views; it has not met its burden to provide the Court with a basis to disturb the Board’s judgment.

B. Substantial Evidence Supports the Board’s Finding that the Union Does Not Have a Conflict of Interest that Would Impair Its Representation of the Stagehands

Substantial evidence also supports the Board’s finding (DDE 11) that the Union has no disabling conflict of interest precluding it from representing a unit of the Company’s stagehands. As the Board found (DDE 8-11), the Company failed, both factually and legally, to carry its heavy burden of proving such a conflict.

Pursuant to Section 7 of the Act, 29 U.S.C. § 157, employees have the right to freely choose their bargaining representative. In its role as bargaining representative, a union “must have the single minded purpose of protecting and advancing the interests of the employees who have selected it as their bargaining agent, and there must be no ulterior purpose.” *Supershuttle Int’l Denver, Inc.*, 357 NLRB No. 19, 2011 WL 2838811, at *2 (2011) (internal quotation marks omitted). Consequently, the Board “has long held that a union may not represent the employees of an employer if the union has a conflict of interest.” *Id.*

When an employer asserts, as a defense to a failure-to-bargain allegation, that “a union has a disabling conflict of interest, the employer must show a ‘clear and present’ danger that the conflict will prevent the union from vigorously representing the employees in the bargaining process.” *Id.* Because such a finding necessarily restricts employees’ Section 7 rights, the employer’s burden is “a heavy one.” *Id.* To meet it, the employer “must show that the alleged conflict of

interest is proximate and substantial, not remote and speculative.” *Mass. Soc’y For Prevention of Cruelty to Children v. NLRB*, 297 F.3d 41, 49 (1st Cir. 2002) (internal quotation marks omitted.); accord *W. Great Lakes Pilots Ass’n*, 341 NLRB 272, 282 (2004) (“[h]ypothesis and speculation” insufficient to disrupt bargaining).

First and foremost, the Company failed to meet its burden because it did not substantiate an essential element of its conflict-of-interest claim: that the international Union certified to represent the stagehands, not its local, actually runs the hiring hall that purportedly competes with the Company’s business. Ample evidence instead establishes that “it is Local 927, not [the Union], that operates the hiring hall.” (DDE 10.) Accordingly, the hiring hall cannot serve to disqualify the Union from representing the stagehands regardless of the nature of its operations.

Contrary to the Company’s suggestion (Br. 52), “[m]ore than a mere affiliation between the [Union] and Local 927 is necessary to place responsibility of the actions of Local 927 onto the [Union].” (DDE 10.) The employer must establish that the certified union has control over, or an ownership interest in, the entity with the alleged conflict in order for that conflict to be attributed to the union. *Compare Visiting Nurses Ass’n, Inc.*, 254 NLRB 49, 50-51 (1981) (conflict attributable to union that controlled association that controlled entity with conflict; union also had direct ties with entity), *with Supershuttle Int’l Denver*, 2011 WL

2838811, at *3 (conflict not attributable to certified union that controlled local where neither controlled, nor had ownership interest in, entity with conflict). As the Board found (DDE 10), there is no record evidence that the Union is involved in operating Local 927's hiring hall or that the Union controls Local 927. (DDE 9; Tr. 334-37, 351.) *See generally Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212 (1979) (international unions are not responsible for the acts of affiliated local unions unless an actual agency relationship exists between the international and the local); *Chapa v. Local 18*, 737 F.2d 929, 932 (11th Cir. 1984) (same).

The Company's arguments to the contrary misrepresent the record evidence. Although the Company cites (Br. 53) the testimony of Neil Gluckman, Local 927's business representative and corresponding secretary, to prove that the Union controls Local 927, his testimony actually demonstrates the opposite—that the two organizations maintain separate operations. (Tr. 294, 334-337.) Specifically, Gluckman does not take direction from the Union in operating the hiring hall, which Local 927 pays him to do. The Union reimburses him only for Union-specific business, which does not include his hiring-hall duties. (Tr. 294, 337.) Further, although some stagehands choose to become members of Local 927, in which case a portion of their dues go to the Union, stagehands do not have to join Local 927 to use the hiring hall. (Tr. 307, 322-25, 333, 351.) Nor does the remittance of a portion of local members' dues to the Union demonstrate that the

Union has control over Local 927 or the hiring hall. Finally, the Company's claim that the Union controls the hiring hall's referral board is contradicted by the very evidence it cites, which explicitly states that Local 927 controls the referral board. (Tr. 337-38, RX 32 p. 20 § 2.3.)

In any event, as the Board further found (DDE 10), even if the Union did operate the hiring hall, that fact alone would not constitute a disabling conflict of interest for the Union under governing jurisprudence. Substantial evidence supports the Board's finding (DDE 9-10) that Local 927's hiring hall is not a profit-oriented business. (RX 33, Tr. 316-17, 353, 362.) To contest that fact, the Company points (Br. 55) to the \$12,712 surplus between Local 927's total income and total expenses and disbursements during one fiscal year. But there is no evidence that the sum the Company cites resulted from Local 927 seeking to generate profits through its hiring hall, which does not actively solicit customers or otherwise drum up "business."²⁵ Local 927 offers referrals through its hiring hall as a service to employers with whom it has agreements and to its members seeking work. (RX 3, Tr. 295, 315-16.) A modest surplus in Local 927's overall operating

²⁵ Gluckman, who runs the hiring hall, explained that policy. (Tr. 316-17, 362.) The Company asserts (Br. 53) that, contrary to Gluckman's testimony, the local "advertises" its services. But it cites only the Atlanta Convention and Visitor Bureau website's listing for Local 927 (RX 4), and there is no evidence that listing is an advertisement paid for by Local 927, rather than simply an informational aid created by the Bureau to help parties planning events in the Atlanta area.

budget one year does not evidence a competitive financial interest in the Company's industry of the sort that has concerned the Board in other cases.²⁶ Accordingly, the Board reasonably rejected (DDE 10-11) the Company's reliance on cases where the Board has found disabling conflicts due to unions' operation of *profit-oriented* businesses which competed directly with the employers of the employees the unions sought to represent, or which served those employers as paying customers. *See Bausch & Lomb Optical Co.*, 108 NLRB 1555, 1562 (1954) (union established and operated optical business that directly competed with employer's optical business); *Visiting Nurses Ass'n*, 254 NLRB at 51 (union operated a nurse-referral business that directly competed with employer's referral business); *St. John's Hosp. & Health Ctr.*, 264 NLRB 990, 993 (1982) (union sought to represent employer's nurses while employer was paying customer of union's nurse-referral registry).²⁷ In other words, there is no evidence that the

²⁶ The Company also asserts in passing (Br. 54) that some of Local 927's agreements with employers are impermissible pre-hire agreements. Whether or not that is the case, and the Board did not decide, it is immaterial to whether the Union has profit-seeking motives that could create a disabling conflict of interest.

²⁷ The additional cases cited by the Company in its brief (Br. 57) are likewise distinguishable or unavailing. One involved a particularized, "clear and present danger" to the employer's business. *See Int'l Bhd. of Elec. Workers, AFL-CIO v. NLRB*, 557 F.2d 995, 1000 (2d Cir. 1977) (union could disclose trade secrets and confidential business matters). The others found no conflict where, like here, the employer failed to carry its heavy burden to show such danger. *See NLRB v. Walker Cnty. Med. Ctr., Inc.*, 722 F.2d 1535, 1541 (11th Cir. 1984) (no evidence union would not properly represent nurses where union board members sometimes

Union—even if, counterfactually, it did control Local 927’s hiring hall—would benefit, in the form of higher profits, from damaging the Company’s business to the detriment of the stagehands the Company employs. (DDE 10; RX 33, Tr. 35.)

Based on ample evidence, the Board thus properly found that the Company had failed to carry its heavy burden of demonstrating that Local 927’s hiring hall would interfere with the Union’s representational duties in a manner creating a disabling conflict of interest.

occupied supervisory positions at hospitals), *W. Great Lakes Pilots*, 341 NLRB at 275, 282-83 (union’s advocacy for regulatory reform antithetical to employer’s business interests did not prove an intent to put employer out of business).

CONCLUSION

As demonstrated above, the Company has not met its burden to invalidate the Union's certification by demonstrating either that the stagehands are not statutory employees or that the Union is unfit to represent them. Accordingly, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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June 2015

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

CREW ONE PRODUCTIONS, INC.)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	No. 15-10429-F
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	Board Case No. 10-CA-138169

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,044 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 24th day of June, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2015, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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