

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 01**

THE WANG THEATRE, INC. D/B/A CITI
PERFORMING ARTS CENTER

and

BOSTON MUSICIANS ASSOCIATION,
AW AMERICAN FEDERATION OF
MUSICIANS LOCAL UNION NO. 9-535,
AFL-CIO

Case No. 01-CA-179293

**MOTION FOR SUMMARY JUDGMENT AND FOR
ISSUANCE OF BOARD DECISION AND ORDER**

Counsel for the General Counsel hereby moves for Summary Judgment on the pleadings and supporting papers and for issuance of a Decision and Order by the National Labor Relations Board (herein called the Board), pursuant to Sections 102.24 and 102.50 of the Board's Rules and Regulations, and in support of said Motion states the following:

1. On January 5, 2016, Boston Musicians Association A/W American Federation of Musicians, Local Union 9-535, AFL-CIO (herein called the Union or Petitioner) filed a representation petition in Case No. 01-RC-166997 (Exhibit A), seeking an election among certain employees of the Wang Theatre, Inc. D/B/A Citi Performing Arts Center (herein called Respondent or Employer).
2. On January 28, 2016, following a hearing before a Hearing Officer of the Board on January 13, 2016, the Acting Regional Director of Region 01 (herein called the Acting Regional Director), issued a Decision and Direction of Election (Exhibit B),

ordering an election by mail ballot among the following employees of Respondent (herein called the Unit):

All musicians employed by The Wang Theatre, Inc. at its performance hall at 270 Tremont Street, Boston, Massachusetts, but excluding all other employees, guards and supervisors as defined in the Act.

3. On February 12, 2016, Respondent filed a Request for Review of the Acting Regional Director's Decision and Direction of Election (Exhibit C¹), which also included a request for a stay of the election.

4. On March 1, 2016, the Union filed a Motion in Opposition to Respondent's Request for Review of the Acting Regional Director's Decision and Direction of Election (Exhibit D).

5. On March 10, 2016, Respondent filed a Reply to the Opposition to Respondent's Request for Review of the Acting Regional Director's Decision and Direction of Election (Exhibit E).

6. On March 11, 2016, the Board rejected Respondent's Reply to the Opposition to Respondent's Request for Review of the Acting Regional Director's Decision and Direction of Election (Exhibit F).

7. On March 14, 2016, Respondent filed a Motion to Strike the Opposition of the Union to Respondent's Request for Review of the Acting Regional Director's Decision and Direction of Election (Exhibit G).

8. On March 22, 2016, the Region opened and tallied the votes from the mail ballot election of Respondent's employees in the above-described unit under the

¹ Attachments to Exhibit C, Respondent's Request for Review, have been omitted due to technical issues and are available upon request.

supervision of the Regional Director, as indicated in the Tally of Ballots (Exhibit H), which revealed the following results:

Approximate number of eligible Voters	16
Void Ballots.	1
Votes cast for Petitioner	9
Votes cast against participating labor organization.	0
Valid votes counted.	9
Challenged ballots	0
Valid votes counted plus challenged ballots.	9

Challenges are not sufficient in number to affect the results of the election.

9. On March 30, 2016, the Acting Regional Director certified the Union as the exclusive collective bargaining representative of the Unit (Exhibit I).

10. On June 3, 2016, Respondent's Request for Review of the Acting Regional Director's Decision and Direction of Election was denied (Exhibit J). The Board also therein denied Respondent's Motion to Strike and its request to stay the election. The Motion to Strike contained an implicit request for remand to submit additional evidence, which was also denied.

11. By email on June 10, 2016, the Union requested that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit (Exhibit K).

12. By email on June 29, 2016, Respondent replied to the Union that there was nothing to negotiate about and there would not be bargaining (Exhibit L).

13. On June 30, 2016, the Union filed the charge herein, alleging that Respondent had violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union (Exhibit M). The charge was served upon Respondent by regular mail on July 1, 2016 (Exhibit N).

14. On July 14, 2016, the Regional Director issued a Complaint and Notice of Hearing (Exhibit O) alleging, inter alia, that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain with the Union. The Complaint and Notice of Hearing was served by certified mail upon Respondent on July 14, 2016 (Exhibit P).

15. On July 28, 2016, Respondent filed an Answer to the Complaint (Exhibit Q).

16. In its Answer, Respondent admits or essentially admits the filing and service of the charge; its status as an employer engaged in commerce under Sections 2(2), (6), and (7) of the Act; and the Union's status as a labor organization under Section 2(5) of the Act; and that the Union was certified as the exclusive collective-bargaining representative of the Unit (Exhibit Q, paragraphs 1, 2, 3, 4, 5, 7 and 8).

17. In its Answer, Respondent essentially admits that on June 10, 2016, the Union requested that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit and that Respondent has neither bargained with nor recognized the Union (Exhibit Q, paragraphs 9 and 10).

18. The Respondent denies that the Unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act and denies that it has committed any unfair labor practices by refusing to recognize and bargain with the Union (Exhibit Q, paragraphs 6, 11 and 12).

19. In its Answer, by its First Affirmative Defense, Respondent asserts that it has no duty to bargain with the Union because there is a stable, on-going absence of employment in the Unit, as established by events since the representation hearing.

20. In its Answer, by its Second Affirmative Defense, Respondent asserts that it had no duty to bargain because the Union has not demanded to bargain over any term and condition of employment over which the Respondent has control.

21. In its Answer, by its Third Affirmative Defense, Respondent asserts that it has no duty to bargain because the Unit is not an appropriate unit since the Respondent does not control terms and conditions of employment sufficient to allow for meaningful bargaining.

22. In its Answer, by its Fourth Affirmative Defense, Respondent asserts that it has no duty to bargain because the Union seeks to bargain over terms and conditions of employment that are set through collective bargaining between the Union's parent organization, the American Federation of Musicians, and non-party producers.

23. In its Answer, by its Fifth Affirmative Defense, Respondent asserts that it has no duty to bargain because the Union seeks to bargain a contract that would violate Section 8(e) of the Act.

24. In its Answer, by its Sixth Affirmative Defense, Respondent asserts that it has no duty to bargain because the Union seeks to bargain in violation of Section 8(b)(4) of the Act.

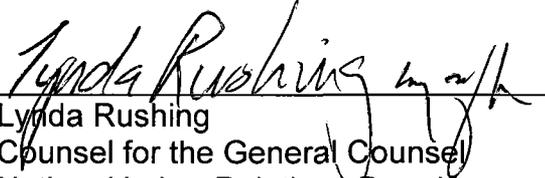
25. For the reasons set forth in the attached Memorandum, and noting that Respondent has admitted in its Answer facts sufficient to establish that Respondent has violated the Act as alleged in the Complaint, and that it has raised no material issue of fact requiring a hearing, Respondent has no valid defense to the Complaint.

WHEREFORE, Counsel for the General Counsel respectfully moves:

1. That all allegations of the Complaint be deemed to be true and so found;
2. That the Board issue a Decision and Order finding that Respondent violated Section 8(a)(1) and (5) of the Act; and
3. That the Board grant such further relief as may be appropriate.

Dated: August 4, 2016

Respectfully submitted,


Lynda Rushing
Counsel for the General Counsel
National Labor Relations Board
Region 01

Attachments

EXHIBIT A

FORM NLRB-502 (RC)
(4-15)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RC PETITION

DO NOT WRITE IN THIS SPACE	
Case No. 01-RC-166997	Date Filed 01-05-2016

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlr.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. **The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

2a. Name of Employer
The Wang Theatre, Inc. d/b/a Citi Performing Arts Center

2b. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)
270 Tremont Street, Boston, Massachusetts 02116

3a. Employer Representative - Name and Title
Michael Szczepkowski, VP & General Manager

3b. Address (If same as 2b - state same)
same

3c. Tel. No.
617-482-9393

3d. Cell No.

3e. Fax No.
617-451-1436

3f. E-Mail Address
mszczepkowski@CitiCenter.org

4a. Type of Establishment (Factory, mine, wholesaler, etc.)
Performing Arts Center

4b. Principal product or service
Performing Arts

5a. City and State where unit is located:
Boston, Massachusetts

5b. Description of Unit Involved

Included: Musicians

Excluded: All other employees and managers and supervisors within the meaning of the Act

6a. No. of Employees in Unit:
20+

6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes No

Check One: 7a. Request for recognition as Bargaining Representative was made on (Date) 11/10/15 and Employer declined recognition on or about 11/10/15 (Date) (If no reply received, so state).

7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (If none, so state).
none

8b. Address

8c. Tel No.

8d Cell No.

8e. Fax No.

8f. E-Mail Address

8g. Affiliation, if any

8h. Date of Recognition or Certification

8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)

9. Is there now a strike or picketing at the Employer's establishment(s) involved? No If so, approximately how many employees are participating? _____
(Name of labor organization) _____, has picketed the Employer since (Month, Day, Year) _____.

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)

10a. Name	10b. Address	10c. Tel. No.	10d. Cell No.
		10e. Fax No.	10f. E-Mail Address

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.

11a. Election Type: Manual Mail Mixed Manual/Mail

11b. Election Date(s):
January 19, 2016

11c. Election Time(s):

11d. Election Location(s):

12a. Full Name of Petitioner (including local name and number)
Boston Musicians' Association, Local 9-535, AFM

12b. Address (street and number, city, state, and ZIP code)
130 Concord Avenue, Belmont, Massachusetts 02478

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state)
American Federation of Musicians

12d. Tel No.
617-489-6400

12e. Cell No.
617-212-9840

12f. Fax No.
617-489-6962

12g. E-Mail Address
patorch@msn.com

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title **Gabriel O. Dumont, Jr.**

13b. Address (street and number, city, state, and ZIP code)
141 Tremont Street, Suite 500, Boston, Massachusetts 02111

13c. Tel No.
617-227-7272

13d. Cell No.
617-733-4804

13e. Fax No.
617-227-7025

13f. E-Mail Address
gdumont@dmbpc.net

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print) Gabriel O. Dumont, Jr	Signature 	Title Counsel	Date January 5, 2016
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WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1**

**THE WANG THEATRE, INC. D/B/A CITI
PERFORMING ARTS CENTER**

Employer

and

**BOSTON MUSICIANS ASSOCIATION, A/W
AMERICAN FEDERATION OF MUSICIANS LOCAL
UNION NO. 9-535, AFL-CIO**

Petitioner

Case 01-RC-166997

DECISION AND DIRECTION OF ELECTION

The Petitioner, Boston Musicians' Association, a/w American Federation of Musicians, Local Union No 9-535, AFL-CIO, seeks a representation election among musicians employed by The Wang Theatre, Inc. d/b/a Citi Performing Arts Center.

The Employer asserts that the petition should be dismissed on the ground that the petitioned-for employees do not constitute an appropriate bargaining unit because they are not solely employed by the Employer. Additionally, the Employer asserts that, because no musicians have worked in the past year, they lack sufficient work hours to make them eligible to vote under any reasonable formula ever adopted by the Board.

The Petitioner takes the position that the musicians constitute an appropriate collective bargaining unit, and that the Board should apply the eligibility standard announced in *The Julliard School*¹ to determine who is eligible to vote in the election.

For the reasons set forth below, I find that the petitioned-for employees constitute an appropriate unit for collective bargaining employed by the Employer, and that the eligibility formula set forth in *Julliard School* should be applied. Accordingly, I shall direct an election in the unit found appropriate.

I. FACTS

The Employer operates the Wang Theatre ("Wang"), a performance venue located at 270 Tremont Street, Boston, Massachusetts. The Wang presents theatrical performances, including musical theater productions, as well as concerts, dance shows, and other "star attractions." The Employer does not produce the performances, but contracts with independent producers, who bring the events to the Wang.

There are two types of contracts between the Employer and the producers. In the first arrangement, known as a "four-wall rental," the producer or promoter rents the venue, assumes

¹ 208 NLRB 153 (1974).

all expenses for the production, and reaps all profits from the performances. In the second, the venue acts as a promoter and shares the costs and revenues associated with the production. In 2014 and 2015, the only productions for which the Employer was a promoter were *Annie*, *White Christmas*, and *Elf*. Musical productions typically run for two or three weeks, with eight performances each week.

The producer determines whether a production will use live or recorded music. If live performers are to be used, the producer typically supplies at least some of the musicians. In some cases, the producer requests that the Employer hire local musicians, either to furnish the music for the performances or to supplement its own musicians.² When this happens, the Employer uses a local contractor to hire the musicians specified by the producer. This contractor is an employee of the Employer.

In 2014, there were 21 productions at the Wang. Of those, only two – *Annie* and *White Christmas* – required the hire of local musicians. For *Annie*, five musicians traveled with the show, and eight were hired locally by the Employer. For *White Christmas*, two musicians traveled with the show and thirteen were hired locally. In all, seventeen musicians were hired by the Employer to perform at the Wang in at least one of those productions. The musicians hired by the Employer in 2014 worked between 19 and 105 hours for the two productions combined. In 2015, the Wang hosted 22 productions, none of which used local musicians hired by the Employer.³

From 2004 to 2007, the Petitioner and the Employer were parties to a collective bargaining agreement covering the same unit sought here. The parties did not sign a successor agreement, and have not had a contractual relationship since 2007.

Employer witness Michael Szczepkowski acknowledged that the procedures for hiring musicians, as well as the respective rights of the Employer and the producers, have not changed since the parties had a collective bargaining agreement in 2004-2007. Both then and now, producers determined how many musicians were required for each production, as well as the number of local musicians to be hired. Local musicians are paid according to the union wage scale.⁴

The Petitioner had a collective bargaining agreement with the Employer's not-for-profit arm, Tremont Theatre, Inc., which operates the Shubert Theatre in Boston, and currently has an agreement with the Opera House, an unaffiliated venue in Boston. Both venues present productions similar to those produced at the Wang. Both have contracts with producers that are similar or identical to those between the Employer and the producers with which it contracts.

² Whether or not local musicians are hired is often determined by any contract between the producer and the American Federation of Musician's (AFM), the affiliated national organization.

³ In the final production of the year, *Elf*, the producer hired and paid eight local musicians. The Employer reimbursed the producer for the musicians. This was an apparently unprecedented arrangement at the Wang.

⁴ Traveling musicians, who tour with the production, are paid according to Pamphlet B or the Short Engagement Tour (SET) Agreement, which sets forth the wages and working conditions for traveling musicians. Rule 24, which is part of Pamphlet B and SET, addresses the hiring of local musicians and dictates the number of local hires. For example, Rule 24 establishes requirements for laying off traveling musicians and hiring local ones.

The Employer also has collective bargaining agreements with various unions representing stagehands, ushers, wardrobe employees, employees who load and unload equipment on and off trucks, box office employees, and ticket takers. In each case, the Employer provides employees to perform those functions, and the producer must assume the contractual cost of those employees.

Producers have artistic control over the shows they bring to the Wang. The producer determines whether live or recorded music will be used for a production;⁵ whether local musicians will be hired; and if so, how many. The producer employs the conductor who has artistic control over the musicians' performance, regardless of how the musicians are sourced. There is no evidence in the record indicating whether the conductor possesses supervisory authority other than artistic control.

II. CONCLUSIONS AND ANALYSIS

A. The Wang Theatre, Inc. is the employer of the musicians

The Employer takes the position that there is no appropriate bargaining unit because it is not the sole statutory employer of the local musicians who perform at the Wang. According to the Employer, the producer of each show has "ultimate control" over the musicians' terms and conditions of employment, and that an election should not be conducted because third parties control the key terms and conditions of the work. In support of this contention, the Employer contends that the producer determines whether and how many local musicians are to be hired, sometimes even hiring them directly, and that the musicians work "under the sole direction and supervision of the producer's conductor."

I do not agree. I note that there is little evidence in the record concerning the traditional indicia of the employer-employee relationship relative to the producers. In particular, despite the Employer's assertion that the producer has sole discretion over whether local musicians are hired, this term of employment is ultimately determined by the contract negotiated between the Employer and the producer. Moreover, it does not appear that the producer retains any control over the qualifications of those hired, except that they are able to play the required instruments; rather, it appears that the Employer hires the employees and as such clearly is an employer under the Act.

Additionally, although the producer's conductor clearly has artistic control over the musicians, there is no evidence indicating where other traditional supervisory authority lies, beyond the Employer's hiring of employees. For example, the record is silent on who has authority to discipline a musician for showing up late for a rehearsal.

Finally, I note that nothing has changed in the respective authorities of the Employer and producers since 2007, when the parties last had a collective bargaining relationship. The Employer's sole witness acknowledged that the essential responsibilities of the producers and

⁵ The 2004-2007 contract prohibited the Employer from allowing recorded music to be used, in order to avoid displacing musicians. A side agreement was negotiated that made an exception for the Radio City Christmas Spectacular.

the Employer remain unchanged since the expiration of the 2004-2007 contract. If it was appropriate then for the Petitioner to represent and bargain on behalf of the musicians at issue here, then it is still appropriate today. The Employer has presented no evidence of a history of bargaining on a multiemployer basis.

Thus, in the absence of any clear evidence that the producers control or even affect the terms of employment for the musicians, I find that the Employer has not demonstrated the existence of a joint employer relationship and this unit is limited to the Employer. As a single employer unit, the petitioned-for unit is presumptively appropriate under the Act. *Central Transport, Inc.*, 328 NLRB 407, 408 (1999). Therefore, I find that the petitioned-for unit is appropriate.

B. The appropriate formula for voter eligibility

The parties disagree about the formula that should be used to determine voter eligibility. The Employer asserts that, at the very least, any eligible voter must have worked for the Employer in the past year. Additionally, the Employer takes the position that the formula should be based on the number of hours worked, rather than the number of days. The Petitioner, on the other hand, urges that the Region adopt the formula established in *Julliard School*, 208 NLRB 153 (1974), and followed in *Kansas City Repertory Theatre*, 356 NLRB No. 28 (2010).

For the reasons set forth below, I find it is appropriate to apply the *Julliard School* formula in the circumstances presented here.

The Board's most widely used formula for determining voter eligibility for on-call or part-time employees was set forth in *Davison-Paxon Co.*, 185 NLRB 21, 23-24 (1970). Under *Davison-Paxon*, "an employee is deemed to have a sufficient regularity of employment to demonstrate a community of interest with unit employees if the employee regularly averages 4 or more hours of work per week for the last quarter prior to the eligibility date." *Davison-Paxon* at 23-24. However, the Board has also fashioned alternative eligibility formulas to fit unique conditions of particular industries where special circumstances exist in order "to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer." *Trump Taj Mahal Casino*, 306 NLRB 294, 296 (1992), *enfd.* 2 F.3d 35 (3d Cir. 1993); *DIC Entertainment, L.P.*, 328 NLRB 660 (1999), *enfd.* 238 F.3d 434 (D.C. Cir. 2001). The Board has found that "special circumstances" include irregular employment patterns within the entertainment industry. See *The Julliard School*, *supra*, (employees were eligible to vote where they had worked on two productions for a total of 5 days over a 1 year period or at least 15 days over a 2-year period).

I find that the facts of this case show a "special circumstance" aligned with that of *Julliard School* and that the formula set forth within that decision is appropriate and applicable. The petitioned-for musicians work irregular employment patterns, as determined by the contracts between the Employer and producers. When local musicians are hired, they work alongside traveling musicians, rehearsing and performing together for the duration of the production. Typically, a production runs for two or three weeks, with multiple performances on certain days, and musicians are also required to rehearse with the orchestra. Thus, for each of

the two productions in 2014 that used local musicians, employees in the proposed unit worked 16 performances, plus rehearsals.

The Employer takes the position that the Region should adopt the following “objective rule”: An election should not be held where the employer has not employed any employees in the petitioned-for unit within the prior year. However, such a rule has no support in Board precedent, and flies in the face of *Julliard School*, where the Board expressly recognized that employees with irregular employment patterns, especially in the entertainment industry, should not be disenfranchised simply because they have not worked in a year. *Julliard School’s* alternative eligibility tests make it clear that the Board explicitly rejected the Employer’s reasoning.

In the circumstances presented here, it is appropriate to apply the formula established in *Julliard School, supra*, and adopted in *Kansas City Repertory Theatre, Inc.* Thus, employees eligible to vote in the election will include all employees who worked on two productions totaling five days during the past year, or those who worked at least fifteen days in the past two years.⁶ As the Board noted in *Kansas City Repertory Theatre*,

The spirit of Julliard allows for the optimum employee enfranchisement and free choice that is sought by the Board in just this type of case: an entertainment industry employer with a group of employees who, but for an irregular employment pattern, would otherwise constitute an appropriate unit for the purpose of collective bargaining. Id., slip op. at 8.

Accordingly, I find, consistent with *Julliard School, supra*, that musicians employed by the Employer on two productions for a total of five working days over a one-year period, or fifteen days over a two-year period have a community of interest warranting their inclusion in the voting unit.

C. Appropriateness of a mail ballot election

Musicians hired to perform at the Wang work sporadically and with no predictable frequency or schedule. No one in the petitioned-for unit has worked for the Employer in the past year, and there is no indication as to when they will work again.

The Petitioner argues that because of the irregular and unpredictable work schedules, a substantial number of employees will be disenfranchised unless the election is conducted by mail ballot. The Employer asserts that the election should be conducted at the theater, and that it should be postponed until employees in the petitioned-for unit are actually working again.⁷

It is well established that a Regional Director has broad discretion in determining the method by which an election is held, and whatever determination a Regional Director makes

⁶ The Employer misstates the *Julliard School* test, and urges me to adopt a formula requiring employees to have worked a certain number of hours, rather than days. However, such a formula has never been adopted by the Board, and I see no justification for doing so here.

⁷ The Employer could not predict when local musicians would be hired for a performance at the Wang. It cited no authority for adopting a wait-and-see approach to conducting an election, and such an approach is inconsistent with Board policies and practices.

should not be overturned unless a clear abuse of discretion is shown. *San Diego Gas & Electric*, 325 NLRB 1143, 1144 fn. 4 (1998); *Nouveau Elevator Industries*, 326 NLRB 470, 471 (1998). In *San Diego Gas & Electric*, the Board set forth guidelines clarifying the circumstances under which it is within the Regional Director's discretion to direct the use of mail-ballots. Under the guidelines, a mail-ballot election may be appropriate where employees are scattered because of their job duties, geography, and/or varied work schedules, so that all employees cannot be present at a common place and at a common time to vote manually. *GPS Terminal Services*, 326 NLRB 839 (1998). See also NLRB Representation Casehandling Manual, Sec. 11301.2.

I find that the musicians in the petitioned-for unit are scattered in the sense that they are rarely in the same place at the same time. They report to the theater only when they are engaged to rehearse or perform, and the Employer could not predict when that would occur again. All employees in the bargaining unit perform for the Employer on a part-time basis, and most have other jobs in music or another field. These factors increase the chance that holding a manual election would disenfranchise voters. In these circumstances, I find that it is appropriate to conduct a mail ballot election.

CONCLUSION

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All musicians employed by The Wang Theatre, Inc. at its performance hall at 270 Tremont Street, Boston, Massachusetts, but excluding all other employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to

be represented for purposes of collective bargaining by BOSTON MUSICIANS ASSOCIATION, A/W AMERICAN FEDERATION OF MUSICIANS LOCAL UNION NO. 9-535, AFL-CIO.

A. Election Details

A mail ballot election will be conducted as follows: The election will be conducted entirely by mail. Mail ballots with detailed instructions will be mailed to the residences of all eligible employees from the Boston Regional Office on February 11, 2016. To be valid, the ballots must be received at the Boston Regional Office by the close of business on February 26, 2016. Any envelopes that are unsigned are automatically void. The count of mail ballots will be conducted at the Boston Regional Office at 11:00 a.m. on February 29, 2016.

The Employer should submit two sets of mailing labels for all unit employees to this office as soon as possible, but in no case later than February 1, 2016. **If any party feels that the election materials need be in a language other than English**, please notify me immediately. **The Employer should advise me of the number of election notices** it will need for posting at its facility by that date as well.

B. Voting Eligibility

Eligible to vote are those in the unit who worked for the Employer on two productions for a total of five working days over a one-year period, **or** a total of fifteen days over a two-year period preceding the eligibility date of January 22, 2016.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **February 1, 2016**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it

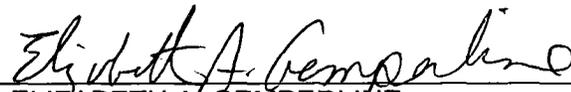
THE WANG THEATRE, INC. d/b/a CITI
PERFORMING ARTS CENTER
Case 01-RC-166997

did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: January 28, 2016



ELIZABETH A. GEMPERLINE
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 01
10 Causeway St Fl 6
Boston, MA 02222-1001



United States of America
National Labor Relations Board
NOTICE OF ELECTION



INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. (See **VOTING UNIT** in this Notice of Election for description of eligible employees.) A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by secret ballot carried out through the U.S. mail under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Employees eligible to vote will receive in the mail *Instructions to Employees Voting by United States Mail*, a ballot, a blue envelope, and a yellow self-addressed envelope needing no postage.

ELIGIBILITY RULES: Employees eligible to vote are those described under the **VOTING UNIT** on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are not eligible to vote.

CHALLENGE OF VOTERS: An agent of the Board or an authorized observer may question the eligibility of a voter. Such challenge must be made at the time the ballots are counted.

AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.

METHOD AND DATE OF ELECTION

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At 4:00PM on Thursday, February 11, 2016, ballots will be mailed to voters from the National Labor Relations Board, Region 01, 10 Causeway St Fl 6, Boston, MA 02222-1001. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Thursday, February 18, 2016, should communicate immediately with the National Labor Relations Board by either calling the Region 01 Office at (617)565-6700 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

All ballots will be commingled and counted at the Region 01 Office on Monday, February 29, 2016 at 11:00AM. In order to be valid and counted, the returned ballots must be received in the Region 01 Office prior to the counting of the ballots.



United States of America
National Labor Relations Board
NOTICE OF ELECTION



INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

VOTING UNIT

EMPLOYEES ELIGIBLE TO VOTE:

All musicians employed by The Wang Theatre, Inc. at its performance hall at 270 Tremont Street, Boston, Massachusetts, who were employed by the Employer during the payroll period ending January 22, 2016.

EMPLOYEES NOT ELIGIBLE TO VOTE:

All other employees, guards and supervisors as defined in the Act.

Eligible to vote are those in the unit who worked for the Employer on two productions for a total of five working days over a one-year period preceding January 22, 2016, or a total of fifteen days over a two-year period preceding January 22, 2016.

	<p>UNITED STATES OF AMERICA National Labor Relations Board 01-RC-166997</p> <p>OFFICIAL SECRET BALLOT</p> <p>For certain employees of THE WANG THEATRE, INC. D/B/A CITI PERFORMING ARTS CENTER</p> <p>Do you wish to be represented for purposes of collective bargaining by BOSTON MUSICIANS ASSOCIATION, A/W AMERICAN FEDERATION OF MUSICIANS LOCAL UNION NO. 9-535, AFL-CIO?</p>	
MARK AN "X" IN THE SQUARE OF YOUR CHOICE		
<p>YES</p> <input type="checkbox"/>	<p>NO</p> <input type="checkbox"/>	
<p>DO NOT SIGN THIS BALLOT. See enclosed instructions.</p> <p>The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.</p>		



United States of America
National Labor Relations Board
NOTICE OF ELECTION



INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union
- Choose representatives to bargain with your employer on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities
- In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- Threatening loss of jobs or benefits by an Employer or a Union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time where attendance is mandatory, within the 24-hour period before the mail ballots are dispatched
- Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a Union or an Employer to influence their votes

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (617)565-6700 or visit the NLRB website www.nlr.gov for assistance.

THE NATIONAL LABOR RELATIONS BOARD

THE WANG THEATRE, INC.,)	
Employer,)	
)	
and)	Case No. 01-RC-166997
)	
BOSTON MUSICIANS' ASSOCIATION,)	
LOCAL 9-535, AFM, AFL-CIO,)	
Petitioner.)	

**WTI'S REQUEST FOR REVIEW OF THE ACTING REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION**

Wang Theatre, Inc. ("WTI"), pursuant to Section 102.67 of the Board's Rules and Regulations, requests review of the Decision and Direction of Election of the Acting Regional Director of Region 1 on January 28, 2016, ("DDE"), attached at Tab 1.

The Board should reverse the Acting Regional Director and dismiss the petition. There is no appropriate unit of musicians employed by this single employer, WTI, because: (1) various independent producers are the primary employer of the putative bargaining unit; (2) there has been no work in the putative unit in over a year; and (3) there are no eligible voters, under any eligibility standard that has ever been adopted by the Board.

Factual Background

The Boston Musicians' Association, Local 9-535, AFM ("BMA"), on January 5, 2016, petitioned for an election among "musicians" whose "employer" is the Wang Theatre, Inc. The is petition attached at Tab 2. On January 12, WTI filed its Statement of Position, attached at Tab 3. A hearing was held on January 13, the transcript of which is attached at Tab 4. There were two witnesses: Michael Szczepkowski, Vice President & General Manager of the Citi Performing Arts Center; and Mark Pinto, Secretary-Treasurer of the BMA. WTI entered eight exhibits, marked as Exhibits A through H and attached at Tab 5. BMA entered two exhibits, marked as Exhibits 1 and 2 and attached at Tab 6. The parties filed post-hearing briefs on January 19.

While the material facts are generally not in dispute, the Acting Regional Director does not cite the record and accordingly misstates a number of facts. As a general matter, the Board therefore cannot rely on the recitation of the facts in the DDE.

WTI's business is managing and operating the Wang Theatre performance hall, located at 270 Tremont Street in Boston, Massachusetts. [Tr. 22]. The Wang Theatre is part of the Citi Performing Arts Center, along with the Shubert Theatre, which is located at 265 Tremont Street and operated by a separate non-profit corporation, Tremont Theater, Inc. [Tr. 22].¹ Petitioner does not seek to represent any musicians employed by TTI or at the Shubert Theatre.

As way of background, BMA and WTI once had a collective bargaining agreement that covered musicians employed by WTI. [DDE 2]. The most recent BMA-WTI CBA expired on September 2, 2007. [Exh. A]. It was last extended through December 31, 2007. [Exh. B]. WTI and BMA never negotiated a successor agreement to the 2004-2007 CBA, and the bargaining relationship lapsed. Conceding that WTI has not recognized BMA for a number of a years, Petitioner left blank Box 7b of the Petition, which asks whether "Petitioner is currently recognized as Bargaining Representative and desires certification under the Act."

The undisputed record evidence is that the bargaining relationship lapsed because WTI does not control the use of music and musicians at the Wang Theatre.² Szczepkowski testified: "The Wang talked with the Boston Musicians Association, but I would have to say we reached a point where I think we felt that we could not bargain over things that we didn't control." [Tr. 30]. Those issues that WTI does not control are "whether there were live musicians" and "whether the number of musicians to be employed." [Tr. 31]. As the Acting Regional Director conceded, those decisions are made by third-party producers. [DDE 2-3].

¹ The DDE inaccurately states that TTI is WTI's "not-for-profit arm." [DDE 2]. In fact, WTI and TTI are separate nonprofit corporations. [Tr. 22].

² While Petitioner promised evidence to the contrary, [Tr. 40], it was never produced.

In this regard, it is important to understand that third-party producers, not WTI, produce the shows that run at the Wang Theatre. [DDE 1]. These shows include touring “Broadway” theatrical musicals, as well as non-musical theatrical performances, concerts, dance shows, and other “star attractions.” [DDE 1]. There are generally about 20 to 25 “shows” at the Wang Theatre each year. [Tr. 24]. In 2015, there were 22; in 2014, 21. [Tr. 24]; [Exh. D]. The musicals and other theatrical performances generally run for two or three weeks, with eight “productions” — that is, performances — per week. The other shows generally run for a single production, or a few at most. *See* [Exh. D].

The producer’s product is the show itself, over which it has complete control. WTI’s business is not the show but rather operating the Wang Theatre, making it available to the independent producers. WTI may “rent” the Wang Theatre, in which case the producer receives all the ticket proceeds and retains all the financial risk. [DDE 1]. Alternatively, WTI “promote” the show, in which case WTI would share the financial risk and upside with the producer. [DDE 2].

While the details of the promoter-producer contracts vary, the basic structure of the arrangement is consistent. The producer provides a “fully produced and cleared Show.” [Exhs. G-I at Art. I, Sec. B]. The producer is paid a weekly “guarantee” out of the ticket revenue. [Exhs. G-I at Art., Sec. B.1.a]. Defined “show expenses” are reimbursed out of the ticket revenues to the party that incurs the cost. [Exhs. G-I at Art. V, Sec. A.4]. If there is money left after paying the guarantee and show expenses, then WTI and the producer “split” the remaining profit, pursuant to a negotiated formula. [Exhs. G-I at Art. V, Sec. B.3]. The DDE inaccurately states that WTI only produced three shows since 2014. [DDE 2]. That fact is not in the record, and WTI has had a promotional role in 16 of the 43 shows during that time.

Whether WTI just rents the Wang Theatre or also serves as the promoter, the producer controls all decisions involving the show itself — including all decisions regarding the use of music and musicians. The Acting Regional Director acknowledged that the producer determines: **(1)** “whether live or recorded music will be used for a production”; **(2)** “how many musicians [are] required for each production”; **(3)** “whether local musicians will be hired”; and **(4)** “if [local musicians are hired], how many.” [DDE 2-3].

Further, in the case of touring musicals, the producer often has a collective bargaining agreement with the Petitioner’s affiliated international, the American Federation of Musicians, (“AFM”). *See* [DDE 2 n.2]. For all three musicals in the record, the producer had a CBA with the AFM. [Tr. 16]. Among other things, these AFM-producer CBAs will “dictate the amount of local hires required.” [Tr. 67]. BMA refused to produce these AFM-producer CBAs, [Tr. 80], even though the putative bargaining-unit members work side-by-side with musicians covered by those contracts. [Tr. 16, 31]. The Acting Regional Director was compelled to, and the Board should, draw an inference that these withheld CBAs are inconsistent with BMA’s position in this matter.

The independent producers directly and solely employ the vast majority of musicians who work at the Wang Theatre. There is no evidence regarding WTI employing any musician for a show that was not a traveling Broadway musical. For the three traveling Broadway musicals in the prior two years, the producers directly hired and solely employed at least some musicians for each show. [DDE 2]. The Acting Regional Director acknowledged that, since 2014, the producers have solely employed all musicians who have been employed at the Wang Theatre. [DDE 3]. The Acting Regional Director accurately summarized: “No one in the petitioned-for unit has worked for [WTI] in the past year, and there is no indication as to when they will work again.” [DDE 5].

The producer-hired musicians have included “traveling” musicians, who perform at multiple cities on the tour. For all three musicals in the prior two years, the traveling musicians were covered by a CBA between the producer and the AFM. [DDE 2 n.4]; [Tr. 16]. The producer-hired musicians have also included local musicians, who have performed only during the show’s run at the Wang Theatre. For instance, the producers of *Elf* hired both the traveling and local musicians in that show’s orchestra during its run at the Wang Theatre in December 2015. [DDE 2 n.3]. Whether “traveling” or “local”, musicians directly hired by the producer are not part of the putative bargaining unit. *See* [DDE 5].

The putative bargaining unit would only include: Those musicians that WTI may source for independent producers, at the request of the producer, to be integrated into the producer’s orchestra during its run at the Wang Theatre. On increasingly rare occasions — and not since 2014 — WTI has so sourced musicians to serve under the direction of a producer. [DDE 3]. The producers of two traveling Broadway musicals in 2014, *Annie* and *White Christmas*, requested WTI’s assistance in finding local musicians. [DDE 3]; [Tr. 27-28]. WTI, through its musical contractor, sourced the number of musicians requested by the producer. [Tr. 31].

On both these occasions in 2014, the putative bargaining unit members were integrated with musicians who were directly hired by the producers, [DDE 2], and covered by AFM-producer CBAs, [Tr. 16]. For *Annie*, the integrated orchestra included 5 musicians who were directly hired by the producer to travel with the show, and 8 musicians who were locally sourced by WTI for the producer. [DDE 2]. For *White Christmas*, the integrated orchestra included 2 musicians who were directly hired by the producer to travel with the show, and 13 musicians who were locally sourced by WTI for the producer. [DDE 2]. In all, 17 musicians were sourced by WTI for the producers. They worked between 19 and 105 hours. [DDE 2].

The Acting Regional Director acknowledged that both integrated orchestras played under the sole supervision of the producer's conductor, who has "control over the musicians' performance, regardless of how the musicians are sourced." [DDE 3]; [Tr. 32]. While the Acting Regional Director labeled such supervision "artistic control", the DDE does not explain what that means other than that these employees are artists. [DDE 3]. Beyond doubt, the producers, through their conductors, oversee the work of the musicians during performances and rehearsal. [Tr. 32]. The producers also determine what music and instruments musicians will play. [Tr. 28].

The Acting Regional Director acknowledged that there is no evidence of day-to-day supervisory control by WTI or its agents. [DDE 3]. Musicians are thus fundamentally different than those employees who are governed by collective-bargaining agreements between WTI and various unions. *See* [DDE 3]. For instance, the stagehands hired by WTI, and represented by a union, work under the direction of WTI's "production manager." [Tr. 60]. These employees can be supervised by WTI's production manager because their work is generally the same for each show. *See* [Tr. 59-61]. The work of WTI's ushers, for instance, is in no way affected by the content of the producer's show. [Tr. 59]. By contrast, musicians' work is show-specific, like the producers' employees who operate sound and lighting during the show. *See* [Tr. 60].

The Acting Regional Director did not dispute that the producers indirectly control the wages and benefits of the putative bargaining unit members. The producers have required that they be paid in compliance with "local union requirements", through the terms of the producer-WTI agreements. [Exhs G and H at Art. III, Sec. E]. The putative members were, in fact, paid the applicable "union scale" published by Petitioner. [DDE 2]; [Exh. F]; [Tr. 28]. In addition, because BMA refused to produce the AFM-producer CBAs, the Board should infer that the AFM and producers have indirectly set the wages of the putative bargaining unit members. [Tr. 80].

The Acting Regional Director did not dispute that the wages and benefits of putative bargaining unit members are passed through to the show. While WTI housed the wages and benefits to musicians it sourced to the producers of *Annie* and *White Christmas* on its payroll, those costs were defined in the WTI-producer agreements as a “documented show expense” and therefore WTI was “reimbursed” out of the ticket revenue. [Exhs. G and H at Art. III, Sec. E; Art. IV, Sec. 4.G].³

Finally, the Acting Regional Director chose to ignore a critical undisputed fact — the BMA would seek to exert secondary pressure on the producers if it were certified to represent the putative bargaining unit. BMA did not seek a unit that included the producers. Yet BMA has admitted that its primary goal in bargaining with WTI would be to pressure **the producers to lay off its own employees**. Petitioner Counsel explained: “If we, [WTI and BMA], have a collective bargaining agreement ..., what would happen is [the producer] would lay off a number of its touring musicians and the venue would hire local musicians.” [Tr. 17]. For example, BMA’s current contract with the Boston Opera House requires producers, who do not have a CBA with the AFM, to layoff half of their own musicians and use union musicians. [Tr. 18]; [Exh. 1 at 5]. In addition, BMA suggested that it may seek to limit the producer’s right to use recorded music. [Tr. 39]. BMA did not suggest it would seek to bargain over wages and benefits, and it presumably would not, given that bargaining unit members have been paid the union scale Petitioner has published.

³ The DDE inaccurately states that WTI “reimbursed” the producer of *Elf* for “eight local musicians.” [DDE 2 n.3]. The WTI-producer agreement defined the wages and benefits paid by the producer for 5 musicians to be a “local documented expense” to be “reimbursed” out of ticket revenue. [Exh. I at Art. III, Sec. E; and Art. IV, Sec. 4.G]. Thus, just like for *Annie* and *White Christmas*, the show paid for the local musicians.

The Decision and Direction of Election

The Acting Regional Director found that the musicians sourced by WTI to the producers of *Annie* and *White Christmas* were **solely employed by WTI**. Inexplicably, the Acting Regional Director found that “there was no clear evidence that the producers control or even affect the terms of employment” for the putative bargaining unit. [DDE 4]. That conclusion, however, ignores all of the specific factual findings and undisputed facts discussed above — that the producers’ conductors supervise the integrated orchestras; that the producers control the amount of unit work; that the producers have indirect control over wages and benefits; and that BMA would seek to pressure the producers, through WTI, to lay off the producers’ musicians.

In finding that WTI was the sole employer, the Acting Regional Director relied exclusively on the fact that WTI served as a hiring agent — “it appears that [WTI] hires the employees and as such clearly is an employer under the Act.” [DDE 3]. The Acting Regional Director did not find that WTI otherwise controlled any terms and conditions of employment. Rather, the Acting Regional Director found that there was no evidence of control by either WTI or the producers. [DDE 3].

Next, the Acting Regional Director concluded that a joint-employer unit is not supported by the evidence. [DDE 4]. There was no reason to address this issue, however. Unlike the putative employer in the case cited by the Acting Regional Director, *Central Transport, Inc.* 328 NLRB 407 (1999), WTI does not claim that a joint-employer unit **is** appropriate. The Acting Regional Director is correct that “[WTI] has not demonstrated the existence of a joint employer relationship”, [DDE 4], but that is entirely irrelevant. WTI’s position in this matter has only been that a unit with WTI as a single employer **is not** appropriate. While a party seeking a joint-employer unit may have the burden to establish joint employment, that does not mean that every petitioned-for single-employer unit is appropriate.

The Acting Regional Director acknowledged but did not substantively address the undisputed fact that there has been no work in the bargaining unit in more than a year. *See* [DDE 5]. The Acting Regional Director could not cite a single case where an election was ordered and the employer had not employed anyone in the bargaining unit in over a year. The Acting Regional Director confused the issue. While individual employees who have not worked in the prior year may be eligible in certain circumstances, the issue here is not about individual eligibility. Rather, the issue is the complete lack of any employment in the unit at all in the prior year. The Board has never ordered an election in such a case.

Finally, based on a misreading of *Julliard School*, 208 NLRB 153, 155 (1974), the Acting Regional Director ordered an election among musicians who worked at least 15 performances total in the prior two years. [DDE 5]. In *Steppenwolf Theatre Co.*, the Board clarified that, under the *Julliard School* formula, employees must have worked either (1) at least two shows for a total of 40 hours during the prior year, or (2) a total of 120 hours during the prior two years. *Steppenwolf Theatre Co.*, 342 NLRB 69, 69 (2004). The Acting Regional Director ignored *Steppenwolf Theatre*. In fact, it is undisputed that no musician would be eligible to vote here under the properly stated *Julliard School-Steppenwolf* formula.

Standard of Review

The Board should grant review, and dismiss the petition. Pursuant to Section 102.67(c) of the Board's Rules and Regulations, a request for review of a Regionals Director's decision in a representation case may be granted, *inter alia*, upon the following grounds:

- (1) That a substantial question of law or policy is raised because of: (i) the absence of; or (ii) a departure from, officially reported Board precedent.
- (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

29 C.F.R. § 102.67(c).

Summary of Argument

The bargaining unit is inappropriate for three independent reasons:

1. The undisputed facts establish that the independent producers, not WTI, are the primary employers of the individuals in the putative bargaining unit. The Board has never endorsed, and should not here endorse, a unit for a non-primary, supplier-only employer.
2. The Acting Regional Director acknowledged that there has been no work in the putative unit in over a year. The Board has never endorsed, and should not here endorse, a unit in which there has been no work in the prior year.
3. There are no eligible voters under any eligibility formula which has ever been endorsed by the Board. The Board has never endorsed, and should not endorse here, an eligibility formula that includes employees who worked less than 120 hours in the prior two years.

Argument

1. THE BARGAINING UNIT IS NOT APPROPRIATE BECAUSE THE INDEPENDENT PRODUCERS ARE THE PRIMARY EMPLOYER OF THE MEMBERS OF THE BARGAINING UNIT.

A. The producers are the primary employers of the putative bargaining unit. There is no evidence that WTI is anything more than a hiring agent of bargaining unit members.

There is no claim that WTI has any control over the amount of work for the putative bargaining unit. Rather, it is undisputed that the producers determine the amount of work for local musicians. Again, the Acting Regional Director conceded that “the producer determines whether live or recorded music will be used for a production; whether local musicians will be hired; and if so, how many.” [DDE at 3]. The Acting Regional Director also acknowledged: “Whether or not local musicians are hired is often determined by any contract between the producer and the [AFM].” [DDE 2 n.2]. Indeed, BMA admitted that its bargaining goal would be to create more work by pressuring **the producers** to lay off their own employees. [Tr. 17].

The Acting Regional Director conceded that there is no evidence of “traditional supervisory authority” by WTI. Indeed, the record evidence is that supervisory authority rests with the producers’ conductors, not any agent of WTI. For instance, while the record may not establish “who has authority to discipline a musician for showing up late for rehearsal”, [DDE 3], the Acting Regional Director did not consider whether that has ever happened. Given that the conductors supervise the rehearsals, [Tr. 32], they have the relevant potential control. *See Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015).

The producers indirectly control the wages and benefits of the members of the bargaining unit. The WTI-producer agreements have required that bargaining unit members be paid at union scale. [Exhs G and H at Art. III, Sec. E]. BMA refused to produce the AFM-producer CBAs, so the Acting Regional Director could not definitively determine whether those CBAs required local musicians be paid at union scale. [Tr. 80]. The Board should infer that the AFM-producer CBAs require wages be paid at union scale. In any case, the record certainly establishes that WTI does not alone control wages.

In sum, the record evidence is that the producers are the primary and “user” employer. The Acting Regional Director conclusion otherwise is clearly erroneous.

B. No Board precedent supports the unit endorsed by the Acting Regional Director. The Board has never approved a single-employer unit that includes the hiring agent (here WTI) and excludes the primary, “user” employers (here the producers). The Board should not take that unprecedented step here. It would undermine the purposes of the Act, requiring fictitious bargaining by WTI, who does not control the terms and conditions of employment, and encouraging unlawful secondary pressure on the producers, who do.

Kansas City Reparatory Theatre, 356 NLRB No. 28 (Nov. 16, 2010), although involving music and musicians, is inapposite. WTI's business — and as a result its relationship with musicians — is fundamentally different from the business of the employer in that case. The Kansas City Reparatory Theatre's business was "planning and producing" theatrical productions and thus it made the decisions regarding the use of music and musicians. *Id.* at *5-6. There were no independent producers, and thus Kansas City Reparatory Theatre controlled the terms and conditions of the musicians in the bargaining unit.

The Board has never endorsed a supplier-employer-only unit. While the Board has found **user-employer-only** units to be appropriate, *see Prof'l Facilities Mgmt., Inc.*, 332 NLRB 345 (2000), a user employer, such as the producers here, has ultimate control over the critical terms and conditions. A user-employer-only unit, therefore, arguably allows the union to negotiate with the employer with the ultimate control over the terms and conditions of employment. By contrast, a supplier-employer-only unit sets up fictitious bargaining, empowering the union to pressure the user employer through the supplier employer. Here, BMA admits this — that its bargaining goal would be to pressure producers to lay off their own employees. [Tr. 17].

But if the Board were to allow an election for this single employer, then the producers would not have an obligation to bargain with BMA. Accordingly, BMA's stated bargaining strategy would amount to unlawful secondary pressure. For instance, in *Associated Musicians (Huntington Town House)*, 203 NLRB 1078 (1973), the Board held that an AFM Local violated Section 8(e) by seeking to enforce a clause in contracts between Huntington, which operated ballrooms, and its patrons that required the patrons to hire only union musicians "on Huntington's premises." *Id.* at 1082. Under *Huntington Town House*, BMA could not lawfully pressure WTI to require the producers to only use BMA musicians at the Wang Theatre.

And the Board need not reach the issue of whether Petitioner’s goal — to pressure the **producers** to lay off its own workforce — would be lawful. Beyond doubt, that goal confirms that a unit with WTI as the “single employer” would undermine the purposes of the Act. The Act, and particularly recent Board law, contemplates bargaining between a union and the employer with “ultimate control” over the terms and conditions of employment. *Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015). Even where there may be an employment relationship, the Board will not endorse an election if third-parties control the key terms and conditions of the work. *See Northwestern University*, 362 NLRB No. 167 (Aug. 17, 2015) (declining to exercise jurisdiction because the Big Ten and NCAA set the key terms and conditions for students on Northwestern’s football team).

Here, the producers control the terms and conditions of employment. Thus, if the putative bargaining unit members want to collectively bargain, it must be with the producers. Petitioner’s international could seek to an expansion of the units covered by its contracts with the producers. BMA could seek to represent units with the producer as the employer. In any case, the collective bargaining must be with the producers, as they control the terms and conditions of employment.

2. THE BARGAINING UNIT IS NOT APPROPRIATE BECAUSE NO ONE HAS WORKED IN THE BARGAINING UNIT IS OVER A YEAR.

The Board should adopt a bright-line rule: Where no individual has been employed in the petitioned-for unit in the prior year, there should be no election. It is well-established that an election should not be held among “individuals with no real continuing interest in the terms and conditions of employment offered by the employer.” *Trump Taj Mahal Casino Resort*, 306 NLRB 294, 296 (1992). Where, such as here, no individual has been employed in the petitioned-for unit in the prior year, there are no individuals with the requisite “continuing interest.”

Indeed, there is no precedent for the Board endorsing an election for a unit in which there has been no employment within the prior year. The Acting Regional Director cited *Julliard School*, 208 NLRB 153 (1974), [DDE 5], but in that case there had been employees in the prior year. The Acting Regional Director misunderstood the issue to be about individual eligibility — whether employees should be “disenfranchised simply because they have not worked in a year.” [DDE 5]. In fact, the issue is about whether the unit is appropriate at all, that is whether there can be an appropriate unit when there has been no employment at all in the prior year. The Board has never endorsed such a unit.

And the Board should not take that unprecedented step here. It would not effectuate the purposes of the Act to create a fictional work force to elect a union to negotiate a collective bargaining agreement for an as yet unhired real work force. Indeed, there is substantial reason to believe there may never be anyone in the bargaining unit ever again. If producers choose to directly hire musicians — like the producers of *Elf* did — then there will be no bargaining unit work. As the Acting Regional Director acknowledged: “there is no indication as to when [bargaining unit members] will work again.” [DDE 5].

3. THE BARGAINING UNIT IS NOT APPROPRIATE BECAUSE THERE ARE NO ELIGIBLE VOTERS UNDER ANY ELIGIBILITY STANDARD THAT HAS BEEN ENDORSED BY THE BOARD.

The eligibility standard adopted by the Acting Regional Director is lower than any standard previously approved by the Board. Indeed, no musician would be eligible here under any eligibility formula that has ever been endorsed by the Board. While WTI recognizes that Regions have discretion in setting eligibility formulas, there are limits. The Acting Regional Director exceeded those limits by allowing, for the first time, employees who worked less than 120 hours in the prior two years to vote.

The Acting Regional Director's reliance on the "*Julliard School*" formula ignores the Board's subsequent clarification of *Julliard School*, 208 NLRB 153, 155 (1974) in *Steppenwolf Theatre Co.*, 342 NLRB 69, 69 (2004). *Julliard School* itself refers to "5 working days over a 1-year period" and "15 days over a 2-year period." But contrary to Petitioner counsel's reading of the law, that means 40 hours in the prior year or 120 hours in the prior two years. See *Steppenwolf Theatre Co.*, 342 NLRB 69, 69 (2004).

In *Steppenwolf Theatre*, the Board clarified that under "the eligibility formula articulated by the Board in *Julliard School*, 208 NLRB 153 (1974), part-time employees who have worked on at least two productions for a total of **40 hours** during the year prior to the eligibility date or who have worked a total of **120 hours** during the past 2 years are eligible to vote." *Steppenwolf Theatre Co.*, 342 NLRB 69, 69 (2004) (emphasis added). In *Kansas City Reparatory Theatre*, 356 NLRB No. 28 (Nov. 16, 2010), the musicians were hired for shows that ran for up to 45 performances, and thus appear to have reached the applicable hours thresholds.

Here, there would be no eligible voter under the properly stated *Julliard School-Steppenwolf Theatre* formula: (1) there have been no musicians during the prior year, and (2) those musicians who were employed in 2014 worked between 19 and 105 hours.

In fact, there would not be any eligible voters here under any eligibility formula that has ever been endorsed by the Board. See *DIC Entertainment, L.P.*, 328 NLRB 660 (1999) (two shows for a minimum of five working days in the last year or at least fifteen workings days in the last year); *American Zoetrope Productions*, 207 NLRB 621 (1973) (two shows during the past year); *Medion, Inc.*, 200 NLRB 1013 (1972) (two shows for five days over prior year); *Davison-Paxon Co.*, 185 NLRB 21 (1970) (four or more hours per week for the last quarter prior to the eligibility date).

Conclusion

Based on all the foregoing, WTI respectfully requests that its request for review be granted and the election be stayed pending resolution of the appropriate unit.

Respectfully submitted,

WANG THEATRE, INC.

/s/ Arthur G. Telegen_____

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Dated: February 12, 2016

Certificate of Service

The undersigned certifies that the foregoing and the accompanying documents have been filed electronically with the National Labor Relations Board on the 12th day of February 2016, and also a copy has also been sent via email to counsel for Petitioner, Gabriel O. Dumont, Jr., at gdumont@dmbpc.net; and the Acting Regional Director of Region, Elizabeth A. Gemperline, at elizabeth.gemperline@nlrb.gov.

/s/ N. Skelly Harper

**UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

**THE WANG THEATRE, INC. d/b/a CITI
PERFORMING ARTS CENTER,**

Employer

And

Case 01-RC-166997

**BOSTON MUSICIANS' ASSOCIATION,
a/w AMERICAN FEDERATION OF MUSICIANS,
LOCAL UNION NO. 9-535, AFL-CIO,**

Petitioner

**OPPOSITION OF BOSTON MUSICIANS' ASSOCIATION TO WTI'S REQUEST
FOR REVIEW OF THE ACTING REGIONAL DIRECTOR'S DDE**

The Boston Musicians' Association, a/w American Federation of Musicians, Local Union No. 9-535 (hereinafter, "BMA" or "Union"), pursuant to Rule 102.67(f), hereby opposes the *Request for Review* submitted by The Wang Theatre, Inc. d/b/a Citi Performing Arts Center (hereinafter, "The Wang" or "Theatre"). The instant matter arises out of a Petition filed by the BMA seeking to represent a bargaining unit of casual employees who, prior to the production of "Elf The Broadway Musical" from November 17, 2015 through December 6, 2015, had consistently been employed by The Wang as musicians whenever local musicians were required by the touring productions.

In opposing the Petition, The Wang contended/contends that the Region should not conduct an election because "productive bargaining would require the involvement of the multiple third-party producers who decide whether to hire local musicians;" and because, according to The Wang, "no musicians would be eligible here under any formula that has ever

been applied” since The Wang has not directly employed musicians after December 28, 2014, which was the final performance of the touring musical, “Irving Berlin’s White Christmas.”

The Wang’s arguments were rejected by the Acting Regional Director in a *Decision and Direction of Election* dated January 28, 2016, from which The Wang has submitted its *Request for Review*. For the reasons set out below, the arguments of The Wang should be rejected and the *Request for Review* denied.

Argument

The process under which local musicians, such as those represented by the BMA, were/are hired by touring musical productions has remained unchanged over the last several decades. In this regard, productions that are presented at venues such as The Wang and the Opera House are touring productions. These productions present in venues that the producers do not own. In some instances, the producers simply rent the venue and, in those instances, the producers assume all of the expenses of the productions. This arrangement is referred to as a “Four-Wall Rental.” In other instances, such as those reflected in Exhibits G, H and I,¹ the venue acts as the promotor and, in that capacity, shares with the producer the cost of presenting the show and shares in any revenue that exceeds the cost of the show.

In many but not all venues, the venues are parties to collective bargaining agreements covering the various classifications of workers who provide services relating to the touring production, including musicians. In the case of The Wang, the Theatre currently has collective bargaining agreements with the Teamsters,² the stagehands,³ the wardrobe workers,⁴ the ushers

¹ The lettered exhibits are from the *Statement of Position* submitted by The Wang in this case.

² When a show arrives at The Wang, the Teamsters unload the equipment from the trucks that are touring with the show and place the materials on the loading dock. At the end of the show’s run at the Theatre, the Teamsters take the materials from the loading dock and load the materials into the trucks carrying the show’s materials.

and the ticket takers and the box office personnel.⁵ These categories of employees are identified in Section IV of Exhibits G, H and I under the heading “WTI WILL PROVIDE.” While the producers will either assume all of the costs associated with the services covered by these collective bargaining agreements when the arrangement is a Four-Wall Rental or share in these costs when the venue is acting as the promoter, the producers have no say in the terms and conditions of employment of any of these categories of employees.

Generally speaking, in terms of employees who are musicians, there are four categories of touring musical productions. If the tour is a union show, it will be touring under either the AFM Pamphlet B (Pamphlet B) Agreement or the Short Engagement Tour (SET) Agreement. These agreements set the terms and conditions for the musicians who are traveling with the show. These musicians are AFM members and are referred to as “travelers.” The Pamphlet B and the SET Agreements also both include Rule 24. The current Rule 24 is Appendix G to Exhibit A. Rule 24 establishes the requirements for the laying-off of travelers and the hiring of local musicians.⁶ Boston is a Rule 24 city. Local musicians who are hired pursuant to Rule 24 are not governed by the terms and conditions of the Pamphlet B or SET Agreements but, rather, work under the terms and conditions set out in collective bargaining agreements covering the venue.⁷ A union tour may also be designated and approved by the AFM as “self-contained” in

³ The stagehands perform the load-in from the dock into the venue and the load-out from inside the venue to the dock. In addition, stagehands will perform other necessary services including rigging the lights and scenery, installing the sound equipment and doing any scene changes required by the show.

⁴ The wardrobe workers dress the cast and clean and repair the costumes worn by cast members.

⁵ The ushers and ticket takers and the box office employees perform the services normally associated with those categories of employees.

⁶ When local musicians were/are hired at The Wang, they are hired by a contractor who was/is a “W-2” employee of The Wang.

⁷ For “Annie” and “Irving Berlin’s White Christmas” local musicians were paid according to BMA Wage Scale X (Exhibit F) since there was no BMA collective bargaining agreement in place.

which case local minimums will not apply; and, therefore, the producer may but will not be required to lay-off travelers and hire local musicians. *See* Exhibit A, Article IV, Section 1 and Appendix G, ¶E; Petitioner #1, Article IV, Section 1C.

The fourth category of touring musicals is non-union shows, *i.e.* shows that are not signatory to either the Pamphlet B or the SET Agreement. With a non-union show, the laying-off of travelers and the hiring of local musicians are governed exclusively by the terms of the venue agreement with the AFM Union Local. In this regard, both the current BMA collective bargaining agreement with the Opera House venue (Petitioner #1) and the last BMA collective bargaining agreement with The Wang (Exhibit A) provide (in the case of the Opera House agreement) or provided (in the case of the last agreement with The Wang) that at least 50% of the musicians required by the show shall be made up of local musicians to be hired and employed by the venue. *See* Petitioner #1, Article IV, Section 1A; Exhibit A, Article IV, Section 1.

Accordingly, contrary to the contention of The Wang, the terms and conditions of all locally employed individuals who are associated with a touring production, including local musicians, are governed solely by the terms of the respective venue collective bargaining agreements such as the agreement between the BMA and the Opera House and the last agreement between the BMA and The Wang.⁸ In fact, when asked on cross examination, The Wang witness, Michael Szczepkowski, testified as follows regarding the comparison between how producers contracted with The Wang when Exhibit A was in force and the current arrangement:

⁸ Exhibit A is the last collective bargaining agreement between the BMA and The Wang. That agreement included twenty-eight (28) distinct articles and nine (9) appendices that addressed all aspects of local musicians' terms and conditions of employment. The agreement fatally undercuts The Wang's contention that "productive bargaining would require the involvement of the multiple third-party producers who decide whether to hire local musicians."

BY MR. DUMONT:

Q Let me ask it this way. Back in 2003-2008, producers contracted with the Wang, correct?

A That's correct.

Q To have presentations, correct?

A That's correct.

Q And currently, we see three of them, there are musicals that are contracted with the Wang, correct? We had Annie. We had White Christmas and most recently Elf. Correct?

A That's correct.

Q Other than the fact that we don't have a collective bargaining agreement in place right now, is there anything different between the authority and the responsibilities of a producer today versus a producer back in 2006?

A I don't believe so. Tr. 38.

Accordingly, it is clear that The Wang's argument that the Region should not conduct an election because "productive bargaining would require the involvement of the multiple third-party producers who decide whether to hire local musicians" has no merit.⁹

As noted *supra*, The Wang further argues that the Petition should be dismissed because no local musicians have been employed since December 28, 2014, which was the last show of the production "Irving Berlin's White Christmas;" and, as such, "no musicians would be eligible

⁹ In pressing its argument, The Wang ignores the following conclusion of the Acting Regional Director which was based on the testimony of The Wang's witness:

Finally, I note that nothing has changed in the respective authorities of the Employer and producers since 2007, when the parties last had a collective bargaining relationship. The Employer's sole witness acknowledged that the essential responsibilities of the producers and the Employer remain unchanged since the expiration of the 2004-2007 contract. If it was appropriate then for the Petitioner to represent and bargain on behalf of the musicians at issue here, then it is still appropriate today. The Employer has presented no evidence of a history of bargaining on a multiemployer basis. DDE at pp. 3-4.

In addition, The Wang simply ignores the evidence presented by the BMA that explained the interrelationship between the Pamphlet B and SET agreements that apply to touring union musicals and the AFM Local Union collective bargaining agreements that cover the venues in which these touring musicals perform, not just in Boston but in cities across the United States.

here under any formula that has ever been applied.” In so arguing, The Wang misconstrues the role and the responsibility of the Regional Director in cases in which the employment patterns warrant a deviation from the *Davison-Paxon* formula. To The Wang, the Acting Regional Director’s role was to ignore the historical employment patterns of musicians at The Wang and mechanically apply eligibility formulas that have been adopted in the past and, if no previously adopted formula could be used in the instant case, the Petition must be dismissed. The Wang’s argument fails on two grounds.

First, in pressing its argument, The Wang mischaracterizes the eligibility formula approved in *Juilliard School*, 208 NLRB 153 (1974). In this regard, the eligibility formula used in *Juilliard School* was two productions for a total of five days over a one-year period or at least fifteen days over a two-year period. The casual employees at issue in *Juilliard School* were *per diem* employees who worked in the costume, property, electric and carpentry shops. While the Board noted that the *per diem* employees in these shops worked “essentially the same hours” as the full-time employees, the Board’s statement was made in relation to the Board’s determination that the *per diem* employees shared a sufficient community of interest with the full-time employees such that they should be included in the bargaining unit and not in reference to the eligibility formula.¹⁰

While *Juilliard School* did not involve musicians, the Board, in *Kansas City Repertory Theatre, Inc.*, 356 NLRB No. 28 (2010), approved the Regional Director’s use of the *Juilliard School* eligibility formula for a bargaining unit of musicians who had been employed during a limited number of musical productions. In *Kansas City Repertory Theatre, Inc.*, the DDE issued during the Employer’s 2009-2010 season; “[d]uring each performance season of 2006-2007,

¹⁰ In its *Request for Review*, The Wang relies principally on *dicta* in *Steppenwolf Theatre Co.*, 342 NLRB 69, 69 (2004), a case in which the Board declined to deviate from the traditional *Davison-Paxon* formula since the employer in that case produced 14 productions a year, totaling about 500 performances over 48-50 weeks per year.

2007-2008, and 2008-2009, the Employer [had] conducted one musical production in which it hired musicians;” and the Regional Director declined to limit voter eligibility “to only those musicians employed by the Employer for the 2009-2010 performance season.” As in the instant case, a musician’s normal workday would be comprised of between 3-4 hours (except for days in which two performances are scheduled). Surely, if the Regional Director intended in *Kansas City Repertory Theatre, Inc.* to base eligibility on the number of hours worked by musicians as opposed to days worked, the DDE would have had to explain the conversion and certainly would not have defined voter eligibility in the manner in which it was done, *i.e.* “musicians employed by the Employer on two productions for a total of 5 working days over a 1-year period, or 15 days over a 2-year period....”

The Board has fashioned alternative eligibility formulas in the entertainment industry in recognition that casual employees can have real continuing interest in the terms and conditions of employment offered by the employers even when they are not working on a regular basis because of the limited number of productions performed in a venue that require musicians. In the case of musicians, that interest does not relate to the total number of hours worked but, rather, relates to the number of shows and/or performances that a musician actually works for that venue. While for non-musician casual employees it could make sense to determine a casual employee’s continuing interest in the terms and conditions of employment offered by an employer based on a formula that includes the number of hours worked, it does not make sense to base the determination of employee continued interest on hours worked when the employees’ regular work day, by definition, is less than eight hours.

The Wang attempts to distinguish the clearly most relevant decision, *Kansas City Repertory Theatre, Inc.*, by asserting that, in that case, “the musicians were hired for shows that

ran for up to 45 performances and thus appear to have reached the applicable hours threshold.” Left unexplained by The Wang is why then did the Board, in *Kansas City Repertory Theatre, Inc.*, approve a formula based on working days, which, by definition would have only included 3-4 hours of work.

Second, even assuming *arguendo* that The Wang is correct in arguing that the *Julliard School* and *Kansas City Repertory Theatre, Inc.* eligibility formula is based on total work hours and not on days worked, it is not correct to argue that the Acting Regional Director, in the instant case, was restricted to eligibility formulas that have been approved in prior Board decisions. In the instant case, for reasons that could not be explained by The Wang’s witness, a decision was made to have The Wang reimburse the “Producer for the associated charges for engaging the five (5) Musicians to augment the Musicians traveling with the Show (“Musicians Costs”) as a Local Documented expense.” Exhibit I, Section IVG. This arrangement was unprecedented and served the purpose of allowing The Wang to argue that the instant Petition should be dismissed because The Wang (as opposed to the producer) had not employed any musicians during calendar year 2014.

Even if the Acting Regional Director declined to ascribe an improper motive to the unique arrangement in the hiring of musicians for “Elf The Broadway Musical,” it is clear that this unique arrangement should be accounted for in deriving an appropriate eligibility formula. In the past, when local musicians have been hired by The Wang, the hiring has been done by a contractor, Fred Buda, in his capacity as a W-2 employee of The Wang. As can be seen from Petitioner Exhibit #2, Mr. Buda has employed a core group of musicians who certainly have a real continuing interest in the terms and conditions of employment offered by The Wang. In April 2016, the *Wizard of Oz* will be presented at The Wang. At the hearing, The Wang’s

witness was unsure whether local musicians would be hired by The Wang for this production. However, it is clear that when the BMA is certified, any future union productions (unless self-contained and AFM approved) would require the hiring of local musicians by The Wang.¹¹

The BMA respectfully suggests that, based on the patterns of employment reflected in Petitioner Exhibit #1 and the relevant Board precedent, including, in particular, *Kansas City Repertory Theatre, Inc.*, the Acting Regional Director correctly crafted an appropriate eligibility formula.

Respectfully submitted,
**Boston Musicians' Association, a/w AFM,
Local Union No. 9-535,**
By its Attorney,

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Date: March 1, 2016

¹¹ After the DDE issued, The Wang refused a request from the producer of the *Wizard of Oz* that The Wang hire local musicians. The Wang's actions in reference to the hiring for the *Wizard of Oz* confirm that The Wang's arrangement with the producer of *Elf The Broadway Musical*, that the DDE describes as an "unprecedented arrangement," was an unlawful response to the musicians' attempt to exercise their right to organize at The Wang. These actions as well as a similar refusal to hire local musicians for an upcoming production at the Schubert Theatre, which is operated by Tremont Theatre, Inc., The Wang's not-for-profit arm, are the subject of a recently filed Charge.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Opposition of Boston Musicians Association's to Wang Theatre Inc.'s Request For Review of the Acting Regional Director's Decision and Direction of Election has been sent this day electronically to John J. Walsh, Jr., Regional Director at john.walsh@nrb.gov , Assistant Regional Director, Elizabeth Gemperline at elizabeth.gemperline@nrb.gov and to Arthur T. Telegen, Esq. at atelegen@seyfarth.com counsel for The Wang Theatre, Inc. d/b/a Citi Performing Arts Center.

March 1, 2016

/Gabriel O. Dumont, Jr./
Gabriel O. Dumont, Jr.

THE NATIONAL LABOR RELATIONS BOARD

THE WANG THEATRE, INC.,)	
Employer,)	
)	
and)	Case No. 01-RC-166997
)	
BOSTON MUSICIANS' ASSOCIATION,)	
LOCAL 9-535, AFM, AFL-CIO,)	
Petitioner.)	

REPLY IN SUPPORT OF WTI'S REQUEST FOR REVIEW OF THE ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Wang Theatre, Inc. ("WTI") files this Reply to the Opposition of the Boston Musicians' Association, Local 9-535, AFM, AFL-CIO ("BMA") to WTI's Request for Review of the Decision and Direction of Election of the Acting Regional Director of Region 1 ("DDE"). The Reply is necessitated by BMA's effort to rely on facts not in the Record to rescue a Direction of Election that cannot be justified by the Record.

1. The Opposition relies principally on "facts" that are outside of and contradicted by the record. While the Opposition purports to summarize various AFM-producer collective bargaining agreements, [Opp. 3-4], BMA refused to enter those agreements into the record during the hearing, [Tr. 80]. While the Opposition claims to know of discussions between WTI and the producers of *Wizard of Oz*, [Opp. 9 n. 11], the only evidence is that those negotiations were ongoing at the time of the hearing, [Tr. 35]. While the Opposition claims that the direct-hiring of musicians by the producers *Elf: The Musical* was somehow a "response" of WTI to organizing by BMA, that is contradicted by the record: the musicians who were in the *Elf* orchestra were represented by the BMA's parent international, the AFM, [Tr. 16]; and further the unrebutted testimony is that producers, not WTI, decided that producers would directly hire all musicians that were needed for that show, [Tr. 34].

If the Board believes that additional evidence is necessary to resolve this matter, then it should remand and order the Region to reopen the hearing. If the Board does so, then WTI may also choose to offer supplemental evidence. WTI has reason to believe that BMA and some producers are currently negotiating regarding potentially expanding the scope of the current AFM-producer collective bargaining relationships to include local musicians hired directly by the producer.

2. BMA departs from the Record, because it can make no effective argument based on the Record. The Opposition does not contest the two fundamental flaws of the putative unit. First, BMA acknowledges that the third-party producers, not WTI, are the primary employers of the musicians in the putative unit. BMA does not dispute that the producers: control the amount of work; exercise day-to-day supervisory authority; and indirectly set wages and benefits. Consistently, BMA does not argue WTI is anything more than a supplier of musicians.

The Board has never before endorsed such a single-employer unit that excluded the primary, user employers. BMA cannot justify doing so here. BMA states that if certified its bargaining goal would be to pressure the producers to layoff their own musicians and use local musicians hired by WTI. *See* [Opp. 3-5, 9]. While BMA labels this “productive bargaining”, it would be so only because unlawful secondary pressure sometimes is productive. Tellingly, BMA ignores *Associated Musicians of Greater New York, (Huntington Town House)*, 203 NLRB 1078 (1973). Moreover, such pressure certainly would not be bargaining between WTI and BMA. BMA cannot justify the disconnect between the employers whom it would seek to pressure (the producers) and the “employer” who would have a duty to bargain if BMA were certified (WTI). Although ignored by the Opposition, *Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015), counsels that the Act requires bargaining between a union and the employer

with “ultimate control” over the terms and conditions of employment and BMA must seek to bargain with them, not with WTI.

Second, BMA also acknowledges that there has been no employment in the unit since 2014. [Opp. 2]. The Board has never endorsed an election when there had not been any employment in the prior year. Again, BMA cannot justify the Acting Regional Director taking an unprecedented step here. BMA apparently believes that a representation election can create an employment relationship: “when the BMA is certified, any future union productions (unless self-contained and AFM approved) would require the hiring of local musicians by the Wang.” [Opp. 9]. That is simply wrong as a matter of law. No Board precedent supports the proposition that an “employer”, which has not been employing anyone in the putative unit prior to the election, must begin hiring employees into the unit after a union is certified. And WTI would not be under any such obligation here. Even if BMA were certified, the producers could continue to directly hire and solely employ any musicians the producers needed for their shows. In short, BMA continues to put the cart (an election) before the horse (employment).

Instead of addressing the above two fundamental flaws of the unit, the Opposition focuses on the meaning of the so-called *Julliard School* formula. First, WTI submits that the BMA’s reading of that formula is wrong. BMA cannot escape the Board’s explanation of the *Julliard School* formula by the Board in *Steppenwolf Theatre Co.*, 342 NLRB 69 (2004). BMA concedes that there are no eligible musicians here under the *Julliard School* formula as explained by *Steppenwolf Theatre*. But even if BMA’s reading of the *Julliard School* were correct, the putative unit would still not be appropriate. The two flaws discussed above are fundamental, not technical. Critically, BMA disputes neither that the independent producers are the primary employers of the unit, nor that there has been no recent employment in the unit.

Conclusion

Based on the foregoing and the reasons set forth in its Request for Review, WTI respectfully requests that its request for review be granted.

Respectfully submitted,

WANG THEATRE, INC.

/s/ Arthur G. Telegen _____
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Dated: March 10, 2016

Certificate of Service

The undersigned certifies that the foregoing and the accompanying documents have been filed electronically with the National Labor Relations Board on the 10th day of March 2016, and also a copy has also been sent via email to counsel for Petitioner, Gabriel O. Dumont, Jr., at gdumont@dmbpc.net; and the Acting Regional Director of Region, Elizabeth A. Gemperline, at elizabeth.gemperline@nlrb.gov.

/s/ N. Skelly Harper _____



United States Government

NATIONAL LABOR RELATIONS BOARD
1015 HALF STREET, SE
WASHINGTON DC 20570

EXHIBIT F

March 11, 2016

Re: The Wang Theatre, Inc.
Case 01-RC-166997

Arthur G. Telegen
N. Skelly Harper
Seyfarth Shaw LLP
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Boston, MA 02210

Dear Counsels:

This will acknowledge the March 10, 2016 receipt of the Employer's Reply In Support of WTI's Request for Review of the Acting Regional Director's Decision and Direction of Election in the subject case. The Board's Rules and Regulations do not provide for reply briefs to oppositions in representation proceedings. Accordingly, I am unable to forward the Employer's reply brief to the Board for consideration.

Very truly yours,

/s/ Farah Z. Qureshi
Associate Executive Secretary

cc: Parties
Regional Director, Region 1

THE NATIONAL LABOR RELATIONS BOARD

THE WANG THEATRE, INC., Employer,)	
)	
and)	Case No. 01-RC-166997
)	
BOSTON MUSICIANS' ASSOCIATION, LOCAL 9-535, AFM, AFL-CIO, Petitioner.)	
)	

WTI'S MOTION TO STRIKE BMA'S OPPOSITION TO REQUEST FOR REVIEW

Wang Theatre, Inc. ("WTI") hereby moves to strike the Opposition of the Boston Musicians' Association, Local 9-535, AFM, AFL-CIO ("BMA") to WTI's Request for Review of the Decision and Direction of Election of the Acting Regional Director of Region 1 ("DDE"). The Board should not credit the BMA's effort to rely on facts not in the Record to rescue a Direction of Election that cannot be justified by the Record.

1. The Board should strike the Opposition because it relies principally on "facts" that are outside of and contradicted by the record. While the Opposition purports to summarize various AFM-producer collective bargaining agreements, [Opp. 3-4], BMA refused to enter those agreements into the record during the hearing, [Tr. 80]. While the Opposition claims to know of discussions between WTI and the producers of *Wizard of Oz*, [Opp. 9 n. 11], the only evidence is that those negotiations were ongoing at the time of the hearing, [Tr. 35]. While the Opposition claims that the direct-hiring of musicians by the producers *Elf: The Musical* was somehow a "response" of WTI to organizing by BMA, that is contradicted by the record: the musicians who were in the *Elf* orchestra were represented by the BMA's parent international, the AFM, [Tr. 16]; and further the unrebutted testimony is that producers, not WTI, decided that producers would directly hire all musicians that were needed for that show, [Tr. 34].

If the Board believes that additional evidence is necessary to resolve this matter, then it should remand and order the Region to reopen the hearing. If the Board does so, then WTI may also choose to offer supplemental evidence. WTI has reason to believe that BMA and some producers are currently negotiating regarding potentially expanding the scope of the current AFM-producer collective bargaining relationships to include local musicians hired directly by the producer.

2. BMA departs from the Record, because it can make no effective argument based on the Record. The Opposition does not contest the two fundamental flaws of the putative unit. First, BMA acknowledges that the third-party producers, not WTI, are the primary employers of the musicians in the putative unit. BMA does not dispute that the producers: control the amount of work; exercise day-to-day supervisory authority; and indirectly set wages and benefits. Consistently, BMA does not argue WTI is anything more than a supplier of musicians.

The Board has never before endorsed such a single-employer unit that excluded the primary, user employers. BMA cannot justify doing so here. BMA states that if certified its bargaining goal would be to pressure the producers to layoff their own musicians and use local musicians hired by WTI. *See* [Opp. 3-5, 9]. While BMA labels this “productive bargaining”, it would be so only because unlawful secondary pressure sometimes is productive. Tellingly, BMA ignores *Associated Musicians of Greater New York, (Huntington Town House)*, 203 NLRB 1078 (1973). Moreover, such pressure certainly would not be bargaining between WTI and BMA. BMA cannot justify the disconnect between the employers whom it would seek to pressure (the producers) and the “employer” who would have a duty to bargain if BMA were certified (WTI). Although ignored by the Opposition, *Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015), counsels that the Act requires bargaining between a union and the employer

with “ultimate control” over the terms and conditions of employment and BMA must seek to bargain with them, not with WTI.

Second, BMA also acknowledges that there has been no employment in the unit since 2014. [Opp. 2]. The Board has never endorsed an election when there had not been any employment in the prior year. Again, BMA cannot justify the Acting Regional Director taking an unprecedented step here. BMA apparently believes that a representation election can create an employment relationship: “when the BMA is certified, any future union productions (unless self-contained and AFM approved) would require the hiring of local musicians by the Wang.” [Opp. 9]. That is simply wrong as a matter of law. No Board precedent supports the proposition that an “employer”, which has not been employing anyone in the putative unit prior to the election, must begin hiring employees into the unit after a union is certified. And WTI would not be under any such obligation here. Even if BMA were certified, the producers could continue to directly hire and solely employ any musicians the producers needed for their shows. In short, BMA continues to put the cart (an election) before the horse (employment).

Instead of addressing the above two fundamental flaws of the unit, the Opposition focuses on the meaning of the so-called *Julliard School* formula. First, WTI submits that the BMA’s reading of that formula is wrong. BMA cannot escape the Board’s explanation of the *Julliard School* formula by the Board in *Steppenwolf Theatre Co.*, 342 NLRB 69 (2004). BMA concedes that there are no eligible musicians here under the *Julliard School* formula as explained by *Steppenwolf Theatre*. But even if BMA’s reading of the *Julliard School* were correct, the putative unit would still not be appropriate. The two flaws discussed above are fundamental, not technical. Critically, BMA disputes neither that the independent producers are the primary employers of the unit, nor that there has been no recent employment in the unit.

Conclusion

Based on the foregoing, WTI respectfully requests that the Board strike the BMA's Opposition.

Respectfully submitted,

WANG THEATRE, INC.

/s/ Arthur G. Telegen _____
Arthur G. Telegen
N. Skelly Harper
Seyfarth Shaw LLP
Two Seaport Lane, Suite 300
Boston, MA 02210
(617) 946-4949
atelegen@seyfarth.com
sharper@seyfarth.com

Dated: March 14, 2016

Certificate of Service

The undersigned certifies that the foregoing has been filed electronically with the National Labor Relations Board on the 14th day of March 2016, and also a copy has also been sent via email to counsel for Petitioner, Gabriel O. Dumont, Jr., at gdumont@dmbpc.net; and the Acting Regional Director of Region, Elizabeth A. Gemperline, at elizabeth.gemperline@nlrb.gov.

/s/ N. Skelly Harper _____

UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD

Date Filed

Case No. 01-RC-166997

01-05-2016

Date Issued

3/22/2016

City BOSTON

State MA

Type of Election: (Check one:)

(If applicable check either or both:)

Stipulation

8(b) (7)

Board Direction

Mail Ballot

Consent Agreement

RD Direction Incumbent Union (Code)

THE WANG THEATRE, INC. D/B/A CITI PERFORMING ARTS CENTER

Employer

and

BOSTON MUSICIANS ASSOCIATION, A/W AMERICAN FEDERATION OF MUSICIANS LOCAL UNION NO. 9-535, AFL-CIO

Petitioner

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of tabulation of ballots case in the election held in the above case, and concluded on the date indicated above, were as follows:

- 1. Approximate number of eligible voters 16
2. Number of Void ballots 1
3. Number of Votes cast for Petitioner 9
4. Number of Votes cast for
5. Number of Votes cast for
6. Number of Votes cast against participating labor organization(s) 0
7. Number of Valid votes counted (sum 3, 4, 5, and 6) 9
8. Number of challenged ballots 0
9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) 9
10. Challenges are (not) sufficient in number to affect the results of the election.
11. A majority of the valid votes counted plus challenged ballots (Item 9) has been cast for Petitioner

For the Regional Director [Signature]

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For THE WANG THEATRE, INC. D/B/A CITI PERFORMING ARTS CENTER Did not attend

For BOSTON MUSICIANS ASSOCIATION, A/W AMERICAN FEDERATION OF MUSICIANS LOCAL UNION NO. 9-535, AFL-CIO

For [Signature]

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1

EXHIBIT I

THE WANG THEATRE, INC. d/b/a CITI
PERFORMING ARTS CENTER

Employer

and

Case 01-RC-166997

BOSTON MUSICIANS ASSOCIATION, A/W
AMERICAN FEDERATION OF MUSICIANS
LOCAL UNION NO. 9-535, AFL-CIO

Petitioner

TYPE OF ELECTION: RD DIRECTION

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots has been cast for

BOSTON MUSICIANS ASSOCIATION, A/W AMERICAN
FEDERATION OF MUSICIANS LOCAL UNION NO. 9-535, AFL-CIO

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Unit: All musicians employed by The Wang Theatre, Inc. at its performance hall at 270 Tremont Street, Boston, Massachusetts, but excluding all other employees, guards and supervisors as defined in the act.



March 30, 2016

A handwritten signature in black ink, appearing to read "Ronald S. Cohen".

Ronald S. Cohen
Acting Regional Director, Region 1
National Labor Relations Board

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of the regional director's decision to direct an election, if not previously filed. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by Wednesday, April 13, 2016. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

NOTICE OF BARGAINING OBLIGATION

In the recent representation election, a labor organization received a majority of the valid votes cast. Except in unusual circumstances, unless the results of the election are subsequently set aside in a post-election proceeding, the employer's legal obligation to refrain from unilaterally changing bargaining unit employees' terms and conditions of employment begins on the date of the election.

The employer is not precluded from changing bargaining unit employees' terms and conditions during the pendency of post-election proceedings, **as long as** the employer (a) gives sufficient notice to the labor organization concerning the proposed change(s); (b) negotiates in good faith with the labor organization, upon request; and (c) good faith bargaining between the employer and the labor organization leads to agreement or overall lawful impasse.

This is so even if the employer, or some other party, files objections to the election pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (the Board). If the objections are later overruled and the labor organization is certified as the employees' collective-bargaining representative, the employer's obligation to refrain from making unilateral changes to bargaining unit employees' terms and conditions of employment begins on the date of the election, not on the date of the subsequent decision by the Board or court. Specifically, the Board has held that, absent exceptional circumstances,¹ an employer acts at its peril in making changes in wages, hours, or other terms and conditions of employment during the period while objections are pending and the final determination about certification of the labor organization has not yet been made.

It is important that all parties be aware of the potential liabilities if the employer unilaterally alters bargaining unit employees' terms and conditions of employment during the pendency of post-election proceedings. Thus, typically, if an employer makes post-election changes in employees' wages, hours, or other terms and conditions of employment without notice to or consultation with the labor organization that is ultimately certified as the employees' collective-bargaining representative, it violates Section 8(a)(1) and (5) of the National Labor Relations Act since such changes have the effect of undermining the labor organization's status as the statutory representative of the employees. This is so even if the changes were motivated by sound business considerations and not for the purpose of undermining the labor organization. As a remedy, the employer could be required to: 1) restore the status quo ante; 2) bargain, upon request, with the labor organization with respect to these changes; and 3) compensate employees, with interest, for monetary losses resulting from the unilateral implementation of these changes, until the

employer bargains in good faith with the labor organization, upon request, or bargains to overall lawful impasse.

¹ Exceptions may include the presence of a longstanding past practice, discrete event, or exigent economic circumstance requiring an immediate response.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE WANG THEATRE, INC. D/B/A CITI
PERFORMING ARTS CENTER
Employer

and

Case 01-RC-166997

BOSTON MUSICIANS ASSOCIATION, A/W
AMERICAN FEDERATION OF MUSICIANS LOCAL
UNION NO. 9-535, AFL-CIO
Petitioner

ORDER

The Employer's Request for Review of the Acting Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.¹

MARK GASTON PEARCE, MEMBER

KENT Y. HIROZAWA, MEMBER

LAUREN McFERRAN MEMBER

Dated, Washington, D.C., June 3, 2016.

¹ The Employer's Motion to Strike and request to stay the election are also denied.

From: Mark Pinto [<mailto:mpinto@BostonMusicians.org>]
Sent: Friday, June 10, 2016 2:18 PM
To: Michael Szczepkowski <MSzczepkowski@CitiCenter.org>
Cc: patrick HOLLENBECK <patorch@msn.com>; Gabriel Dumont <gdumont@dmbpc.net>; Mark Pinto <mpinto@BostonMusicians.org>
Subject: Bargaining request

Michael Szczepkowski,
Vice President & General Manager Citi Performing Arts Center
270 Tremont Street
Boston, MA 02116

June 10, 2016

Dear Michael,

The Boston Musicians' Association (BMA) requests that the Citi Performing Arts Center begin negotiations with the BMA for a successor agreement. Perhaps it would be easiest to begin bargaining after the July 4 holiday, but we would appreciate hearing from you in the next week about which dates your team would be available to meet with the BMA.

Best,

Pat Hollenbeck, BMA President
patorch@msn.com
(617)489-6400

From: MSzczepkowski@CitiCenter.org
To: mpinto@BostonMusicians.org
CC: patorch@msn.com; JSpaulding@CitiCenter.org; RAlfred@seyfarth.com;
ATelegen@seyfarth.com; NHarper@seyfarth.com
Subject: RE: Bargaining request
Date: Wed, 29 Jun 2016 21:49:17 +0000

Mark,

We have received your request to bargain. We are still considering our legal options regarding challenging the bargaining obligation. Nonetheless, without waiving any of our options, we are willing to listen to what you would want to bargain over.

But we are at a total loss as to what we could possibly bargain over at this time.

As you know, there has not been a single employee in the unit since 2014. As you also know, the producers have been hiring their own musicians. We assume that AFM and the producers have been bargaining over their terms and conditions of employment. There does not appear to be anything for the BMA and WTI to negotiate about.

It may be most efficient for you to send an email listing the issues over which you would like to negotiate. We are also willing to meet and discuss this, understanding that such a meeting would not be bargaining.

Thank you,
Michael

Michael Szczepkowski
VP & General Manager
Citi Performing Arts Center
270 Tremont Street
Boston, MA 02116
Phone: 617-532-1107
Fax: 617-482-0752

INTERNET
FORM NLRB-501
(2-08)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
01-CA-179293	6/30/2016

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT	
a. Name of Employer The Wang Theatre, Inc. d/b/a Citi Performing Center	b. Tel. No. 617-482-9393 c. Cell No. f. Fax No. 617-451-1436 g. e-Mail mszczepkowski@citicenter.org h. Number of workers employed 16
d. Address (Street, city, state, and ZIP code) 270 Tremont Street, Boston, Massachusetts 02116	e. Employer Representative Michael Szczepkowski, VP & General Manager
i. Type of Establishment (factory, mine, wholesaler, etc.) Performing Arts Center	j. Identify principal product or service Performing Arts
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (5) _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) The Charging Party is the duly-certified collective bargaining representative of a bargaining unit of musician employees of the Employer. See 01-RC-166997. On June 10, 2016, the Charging Party requested that the Employer bargain. On June 29, 2016, the Employer refused to bargain with the Charging Party.	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) Boston Musicians' Association, Local 9-535	
4a. Address (Street and number, city, state, and ZIP code) 130 Concord Avenue Belmont, Massachusetts 02478	4b. Tel. No. 617-489-6400 4c. Cell No. 617-212-9840 4d. Fax No. 617-489-6962 4e. e-Mail patorch@msn.com
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) American Federation of Musicians	
6. DECLARATION I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By <u></u> (signature of representative or person making charge)	Gabriel O. Dumont, Jr., Attorney (Print/type name and title or office, if any)
Address <u>141 Tremont Street, Suite 500, Boston, MA 02111</u>	Tel. No. 617-227-7272 Office, if any, Cell No. 617-733-4804 Fax No. 617-227-7025 e-Mail gdumont@dmbpc.net
	<u>06/30/2016</u> (date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)**PRIVACY ACT STATEMENT**Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

REGION ONE
BOSTON, MA 02222-1072

2016 JUN 30 PM 12: 10

RECEIVED
NATIONAL LABOR
RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

**THE WANG THEATRE INC. D/B/A
CITI PERFORMING CENTER**

Charged Party

and

**BOSTON MUSICIANS ASSOCIATION
LOCAL 9-535**

Charging Party

Case 01-CA-179293

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, state under oath that on July 1, 2016, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

MICHAEL SZCZEPKOWSKI
VP & GENERAL MANAGER
THE WANG THEATRE, INC. d/b/a
CITI PERFORMING ARTS CENTER
270 TREMONT ST.
BOSTON, MA 02116-5603

July 1, 2016

Date

Joan Collins, Designated Agent of NLRB

Name

/s/ Joan Collins

Signature

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 01**

THE WANG THEATRE, INC. D/B/A CITI
PERFORMING ARTS CENTER

and

BOSTON MUSICIANS ASSOCIATION, A/W
AMERICAN FEDERATION OF MUSICIANS
LOCAL UNION NO. 9-535, AFL-CIO

Case 01-CA-179293

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by Boston Musicians Association, a/w American Federation of Musicians Local Union No. 9-535, AFL-CIO (the Union). It is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act), and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board), and alleges that The Wang Theatre, Inc. d/b/a Citi Performing Arts Center (Respondent), has violated the Act as described below:

1. The charge in this proceeding was filed by the Union on June 30, 2016, and a copy was served on Respondent by U.S. mail on July 1, 2016.
2. At all material times, Respondent has been a non-profit corporation with an office and place of business located at 270 Tremont Street, Boston, Massachusetts (the Boston location), where it has been engaged in the operation of a performing arts theatre.
 3. (a) Annually, Respondent, in conducting its operations described above in paragraph 2, derives gross revenues in excess of \$1,000,000.
 - (b) Annually, Respondent, in conducting its operations described above in paragraph 2, purchases and receives at its Boston location goods valued in excess of \$5,000 directly from points located outside the Commonwealth of Massachusetts.
4. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

6. The following employees of Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act (the Unit):

All musicians employed by The Wang Theatre, Inc. at its performance hall at 270 Tremont Street, Boston, Massachusetts, but excluding all other employees, guards and supervisors as defined in the Act.

7. On March 30, 2016, the Union was certified as the exclusive collective-bargaining representative of the Unit.

8. At all times since March 30, 2016, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

9. By email on June 10, 2016, the Union requested that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

10. Since about June 29, 2016 Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

11. By the conduct described above in paragraph 10, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

12. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on July 28, 2016 or postmarked on or before July 27, 2016**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **October 17, 2016, at 10:00 a.m., at the Thomas P. O'Neill Jr. Federal Building, 10 Causeway Street, 6th Floor, Boston, Massachusetts, 02222**, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-

4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: July 14, 2016

A handwritten signature in black ink, appearing to read "John J. Walsh, Jr.", written in a cursive style.

JOHN J. WALSH, JR., REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 01

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 01

THE WANG THEATRE INC. D/B/A CITI
PERFORMING CENTER

and

BOSTON MUSICIANS ASSOCIATION,
LOCAL 9-535

Case 01-CA-179293

**AFFIDAVIT OF SERVICE OF: Complaint and Notice of Hearing (with forms
NLRB-4338 and NLRB-4668 attached)**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on July 14, 2016, I served the above-entitled document(s) by **certified or regular mail**, as noted below, upon the following persons, addressed to them at the following addresses:

MICHAEL SZCZEPKOWSKI, VP &
GENERAL MANAGER
THE WANG THEATRE, INC. D/B/A CITI
PERFORMING ARTS CENTER
270 TREMONT ST
BOSTON, MA 02116-5603
CERTIFIED 7000 1670 0007 7624 0807

BOSTON MUSICIANS ASSOCIATION,
LOCAL 9-535
130 CONCORD AVE
BELMONT, MA 02478-4035
CERTIFIED 7000 1670 0007 7624 0814

GABRIEL O. DUMONT JR., ESQ.
DUMONT, MORRIS, & BURKE, PC
141 TREMONT ST., SUITE 500
BOSTON, MA 02111-1298
REGULAR MAIL

July 14, 2016

Date

Mary H. Harrington
Designated Agent of NLRB

Name

Mary H. Harrington

Signature

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 01**

THE WANG THEATRE, INC.

and

Cases 01-CA-179293

**BOSTON MUSICIANS ASSOCIATION, A/W
AMERICAN FEDERATION OF MUSICIANS
LOCAL UNION NO. 9-535, AFL-CIO**

ANSWER TO COMPLAINT AND NOTICE OF HEARING

Respondent, The Wang Theatre, Inc. (“WTI”)¹, hereby responds to the Complaint and Notice of Hearing issued by the Regional Director in the above-captioned proceeding.

1. Admitted.
2. WTI admits that it is a non-profit corporation and that it is engaged in the business of managing and operating the Wang Theatre, which is located at 270 Tremont Street, Boston, Massachusetts. WTI otherwise denies the allegations of paragraph 2 of the Complaint.
3. Admitted.
4. WTI admits that its is “an employer” engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, but it denies that it is an employer of employees represented by the Charging Party.
5. Admitted.
6. Denied.
7. WTI admits that, on March 30, 2016, the Acting Regional Director issued a Certification of Reperesentative, in Case 01-RC-166997. WTI otherwise denies the allegations of paragraph 7 of the Complaint.

¹ WTI denies that it does business as “Citi Performing Arts Center.”

8. WTI admits that, on March 30, 2016, the Acting Regional Director issued a Certification of Representative, in Case 01-RC-166997. WTI otherwise denies the allegations of paragraph 7 of the Complaint.

9. WTI admits that, on June 10, 2016, the Charging Party emailed WTI: “The Boston Musicians’ Association (BMA) requests that the Citi Performing Arts Center begin negotiations with the BMA for a successor agreement.” WTI otherwise denies the allegations of paragraph 9 of the Complaint.

10. WTI admits that it has neither bargained with nor recognized the Union at any relevant time. WTI otherwise denies the allegations of paragraph 10 of the Complaint.

11. Denied.

12. WTI admits that it has neither bargained with nor recognized the Union at any relevant time. Answering further, the Respondent denies that it has any obligation to do so under the Act.

13. Denied.

Affirmative Defenses

1. WTI has no duty to bargain because there is a stable, ongoing absence of employment in the Unit, even accepting the meaning of “employment” implied by paragraph 6 of the Complaint. This is established by events since the representation hearing in Case 01-RC-166997.

2. WTI has had no duty to bargain because the Union has not demanded to bargain over any term and condition of employment over which WTI has control.

3. WTI has no duty to bargain because the Unit is not an appropriate Unit, because WTI does not control terms and conditions of employment sufficient to allow for meaningful bargaining.

4. WTI has no duty to bargain because the Union seeks to bargain over terms and conditions of employment that are set through collective bargaining between the Charging Party's parent organization, the American Federation of Musicians, and non-party producers.

5. WTI has no duty to bargain because the Charging Party seeks to bargain a contract that would violate Section 8(e) of the Act.

6. WTI has no duty to bargain because the Charging Party seeks to bargain in violation of Section 8(b)(4) of the Act.

7. WTI reasserts and does not waive all arguments presented to the Board in Case 01-RC-166997.

DATED: July 28, 2016

Respectfully submitted,

WANG THEATRE, INC.

/s/ Arthur G. Telegen
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused the foregoing Answer to Complaint and Notice of Hearing to be electronically filed with the National Labor Relations Board this 28th day of July, 2016, and also caused a true copy to be served by first class U.S. mail upon the following:

John J. Walsh Jr.
Regional Director
National Labor Relations Board, Region 1
Thomas P. O'Neil Jr. Federal Building
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Gabriel O. Dumont Jr., Esq.
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Boston, MA 02111-1298

/s/ Arthur G. Telegen
Arthut G. Telegen

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 01**

THE WANG THEATRE, INC. D/B/A CITI
PERFORMING ARTS CENTER

and

BOSTON MUSICIANS ASSOCIATION, A/W
AMERICAN FEDERATION OF MUSICIANS
LOCAL UNION NO. 9-535, AFL-CIO

Case No. 01-CA-179293

**MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
AND FOR ISSUANCE OF BOARD DECISION AND ORDER**

I. FACTS, COMPLAINT, AND ANSWER

The essential facts and supporting exhibits are described in the Motion for Summary Judgment. The Wang Theater, Inc., d/b/a Citi Performing Arts Center (herein Respondent) makes a direct challenge to the certification of the Boston Musicians Association, a/w American Federation of Musicians Local Union No. 9-535, AFL-CIO (Union) as the certified bargaining representative of Respondent's employees.

Respondent admits the essential facts, as alleged in the Complaint, in its Answer to Complaint. Its "otherwise" denials at paragraphs 2, 7, 8, 9, 10, and 12 of its Answer are without legal significance, and its denial of the legal conclusions alleged in the Complaint do not raise a factual issue that prevents summary judgment.

An analysis of Respondent's Answer makes clear that Respondent is attempting to relitigate the issues in the underlying representation case. Respondent's denial that it is an employer of the employees involved in this case (Answer paragraph 4) is the same as its position in its Request for Review (Exhibit C at pp. 10-13). Respondent's denial

that the unit is appropriate (Answer paragraph 6) is the same as its position in its Request for Review (Exhibit C, pp. 13-15).

The affirmative defenses raised by Respondent's Answer continue to do nothing more than challenge the certification and seek to relitigate issues from the underlying representation case. Respondent first states that it has no duty to bargain with the Union because there is a stable, ongoing absence of employment in the Unit, which is established by events since the representation hearing. However, this position was voiced in the Request for Review (Exhibit C, pp. 13-14) and its Motion To Strike (Exhibit G at p. 3), both of which were denied by the Board. The industry is one marked by intermittent and irregular employment of unit employees. Respondent's claim that there has been no employment since the certification is nothing more than a continuation of the employment pattern that existed at the time of the representation case hearing. Thus, this is merely a continuation of the same argument that Respondent made during the representation case and not a new fact that warrants an evidentiary hearing.

Respondent's assertions in its second and third affirmative defenses - that the Union has not demanded to bargain over any term or condition of employment over which the Respondent has control and that Respondent does not control terms and conditions of employment sufficient to allow for meaningful bargaining - are again reiterations of the arguments in its Request for Review (Exhibit C, pp. 10-13) and its Motion To Strike (Exhibit G at pp. 2-3).

Affirmative defenses 4, 5, and 6 are nothing more than speculation as to the subject matter of bargaining, which Respondent has unilaterally preempted from actually happening by refusing to recognize and bargain with the Union. Further, the

asserted legal entitlement to refuse to bargain because the Union seeks to bargain a contract that would violate Section 8(e), or is a request to bargain in violation of Section 8(b)(4), are not only speculative but were raised in its Request for Review (Exhibit C pp. 11-12) and its Motion To Strike (Exhibit G, pp. 2-3).

Finally, Respondent explicitly makes clear that it is relitigating the representation case when it “reasserts” all the arguments made to the Board in case 01-RC-166997, at Answer paragraph 7.

It is clear from Respondent’s Answer and from the supporting exhibits that Respondent seeks to challenge the Board’s certification of the Union, which it cannot pursue unless it refuses to bargain with the Union. As noted below, the Board has construed such conduct to constitute an admission that an employer has refused to bargain in order to test the validity of a Board certification. Accordingly, in the absence of any newly discovered or previously unavailable evidence or any special circumstances, the Board should find that there are no factual issues in dispute and that none of the Respondent’s denials of the Complaint allegations or affirmative defenses requires a hearing.

II. ARGUMENT AND AUTHORITIES

As noted above, Respondent’s Answer seeks to challenge the validity of the Board’s certification, but in doing so Respondent raises no material issue of fact. It is well settled that issues raised, litigated and decided in a prior representation case may not be relitigated in a subsequent unfair labor practice case, and that the findings on those issues are binding on the parties, absent newly discovered or previously unavailable evidence, or unless some special circumstances exist requiring the Board to

reexamine its prior decision. See Rules and Regulations of the Board, Section 102.67(f); *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146, 162 (1941). The Board has since reiterated this policy in numerous cases. See, e.g., *Biéwer Wisconsin Sawmill, Inc.*, 306 NLRB 732, 732-33 (1992); *Terrace Gardens Plaza, Inc.*, 315 NLRB 749, 749 (1994); *Freds, Inc.*, 343 NLRB 138, 139 (2004).

Respondent asserts that it has no duty to bargain with the Union because events since the representation hearing have established that there is a stable, ongoing absence of employment in the Unit. As described above, this is not anything new; moreover, the Board has previously ruled that changes in the composition of a certified unit after the representation hearing has closed is not “newly discovered and previously unavailable” evidence that warrants a hearing, explaining that “only evidence that existed at the time of the hearing may be offered as newly discovered.” *Orni 8, LLC, and Orpuna, LLC*, 362 NLRB No. 133, FN 4 (2015), citing *Manhattan Center Studios, Inc.*, 357 NLRB No. 139, slip op. at 3 (2011). The Board further clarified that the appropriateness of a bargaining unit is based upon “the conditions of employment as they exist at the time of the hearing.” *Id.*

The remainder of Respondent’s arguments raise issues that were or could have been litigated in the prior representation proceeding. Respondent’s contention that it does not control terms and conditions of employment for Unit members was fully litigated at the hearing and was resolved by the Decision and Direction of Election. In addition, on June 3, 2016, the Board denied Respondent’s Request for Review of the Acting Regional Director’s Decision and Direction of Election, and the Motion To Strike, where many of the same arguments raised by Respondent in the current action were

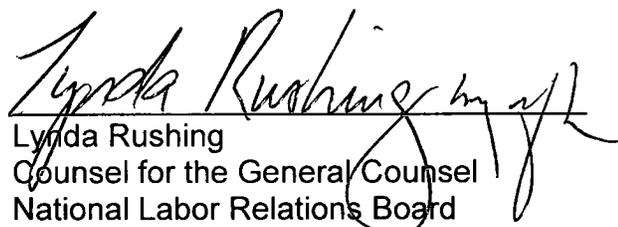
also presented. Respondent does not offer any newly discovered or previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. Accordingly, as a matter of law, Respondent's refusal to recognize the validity of the Board's certification of the Union by failing to bargain with the Union following the issuance of the certification violates the Act. See *Biewer Wisconsin*, supra.

III. CONCLUSION

Based upon the facts admitted by Respondent, the record of the representation proceeding in Case No. 01-RC-166997, supporting exhibits, and the arguments made herein, it is submitted that Respondent has raised no issues which require an evidentiary hearing and has failed to assert any valid defense to the allegations in the Complaint. Accordingly, it is respectfully requested that the Motion for Summary Judgment be granted and that the Board issue a Decision and Order requiring Respondent to post an appropriate Notice, and to recognize and bargain with the Union and to provide the requested necessary and relevant information.

Dated: August 4, 2016

Respectfully submitted,


Lynda Rushing
Counsel for the General Counsel
National Labor Relations Board
Region 01

CERTIFICATE OF SERVICE

I hereby certify that I served copies of Counsel For The General Counsel's Motion For Summary Judgment And for Issuance of Board Decision and Order, with Exhibits, and Counsel For The General Counsel's Memorandum in Support of Motion For Summary Judgment And for Issuance of Board Decision and Order on the parties listed below, by electronic mail, on this date.

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Mary H. Harrington

Mary H. Harrington
Secretary to the Regional Director
August 4, 2016