

**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

**COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION
TO RESPONDENT'S MOTION FOR RECONSIDERATION**

Counsel for General Counsel files this Opposition to the Respondent's Motion for Reconsideration of the Board's November 10, 2016 Decision and Order (the "Decision"). Respondent argues for reconsideration on two grounds: 1) that the Board erred by ignoring precedent that there is no duty to bargain with a certified unit that has no employees, and 2) that the Decision also ignores precedent that a certified union can only demand to bargain with an employer who has the authority to control terms and conditions of employment.

1. The Board Correctly Rejected Petitioner's Argument That There is No Duty to Bargain Because There are No Employees in the Unit.

The Respondent first argues that the Decision ignores past precedent that an employer has no duty to bargain if there are one or fewer employees in the unit. Respondent then states that the Board's Decision erroneously held that it must honor the certification of a no-employment unit "simply because the certification was issued in the prior year." This misstates the Decision, which points out that the Regional Director

properly directed the election using an eligibility standard from *Julliard School*, 208 NLRB 153, 155 (1974), which resulted in a unit consisting of more than one employee, and correctly notes that the Respondent did not argue that the unit was devoid of members at the time of the election or at the time of its refusal to bargain with the Union. (See Dec. at 1, fn 1).

In addition, in its Opposition to Summary Judgment, Respondent maintained that, while it has not employed any unit members for 20 months and anticipated that there would not be any employment in the unit for at least another 8 months, there were no claims that the unit was devoid of members. All of Respondent's claims as to its future hiring practices continue to be speculative. As would be expected in the entertainment industry, employment of musicians is subject to long fallow periods between jobs. This is the very reason that eligibility formulas such as those enunciated by *Julliard School* are utilized, given the intermittent and irregular nature of employment in such fields.

Cases cited by Respondent are inapposite. In *Rice Growers Assn.*, 312 NLRB 837, 839 (1993), the employer closed its plant and permanently laid off all its unit employees, a situation that is drastically at odds with the one under discussion here. Respondent also cites to *Westinghouse Electric Corp.*, 179 NLRB 289 (1969) and *Stack Electric*, 290 NLRB 575 (1988), for the proposition that an employer has no duty to bargain if a unit has only one or fewer employees; however, in *Westinghouse*, one employee of a 2 member unit voluntarily terminated his employment and the Board found that the employer did not intend to replace him, hardly an analogous situation to the one in this case. In *Stark Electric*, the Board refused to certify a unit that consisted

of one employee. This situation also has no parallel to the circumstances of the instant case.

Respondent also ignores the critical fact that the Wang Theatre, Inc. (“WTI”) has had a decades-long bargaining relationship with the Union. Significantly, Respondent’s own witness, Michael Szczepkowski, General Manager of WTI, admitted during the underlying representation hearing that hiring procedures and the rights of the employer and the producers had not changed since the parties last had a collective bargaining agreement in 2004-2007. (See Dec. at 2). Given that nothing about the hiring procedure has materially changed as of the representation hearing and that Respondent offers no new information regarding hiring policy and procedures, it is unclear what is different about the current situation. The Board should again reject this argument.

2. The Board Correctly Rejected Respondent’s Argument That It Does Not Control Terms and Conditions of Employment for Unit Members.

Respondent once again argues that WTI does not control any of the terms and conditions of employment for unit members, thus rendering it unable to bargain over them. This argument has been thoroughly litigated in the underlying representation hearing as well as repeatedly presented by Respondent in the Request for Review of the Acting Director’s Decision and Direction of Election, the Motion To Strike, and in the Opposition to Summary Judgment. The Board should again reject this argument.

Conclusion

Respondent’s Motion for Reconsideration seeks to challenge the Board’s Decision and Order granting the Motion for Summary Judgment, but in doing so, Respondent has presented no “extraordinary circumstances” that should cause the

Board to reconsider the Decision. See Rules and Regulations of the Board, Section 102.48(d)(3). Accordingly, it is respectfully requested that the Motion for Reconsideration be denied.

Dated: December 7, 2016

Respectfully submitted,

/s/ Lynda Rushing

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CERTIFICATE OF SERVICE

I hereby certify that I served copies of Counsel For The General Counsel's Opposition To Respondent's Motion For Reconsideration on the parties listed below, by electronic mail, on this date.

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December 7, 2016