

**No. 17-1650**

---

---

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

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

**and**

**BOSTON MUSICIANS' ASSOCIATION, LOCAL 9-535**

**Interested Party - Intervenor**

**v.**

**THE WANG THEATRE, INC.**

**Respondent**

---

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**USHA DHEENAN**  
*Supervisory Attorney*

**JARED D. CANTOR**  
*Attorney*

*National Labor Relations Board*  
**1015 Half Street, SE**  
**Washington, DC 20570**  
**(202) 273-2948**  
**(202) 273-0016**

**PETER B. ROBB**

*General Counsel*

**JENNIFER A. ABRUZZO**

*Deputy General Counsel*

**JOHN H. FERGUSON**

*Associate General Counsel*

**LINDA DREEBEN**

*Deputy Associate General Counsel*

**National Labor Relations Board**

---

**TABLE OF CONTENTS**

<b>Headings</b>	<b>Page(s)</b>
Statement of subject matter and appellate jurisdiction .....	1
Statement of the issues .....	3
Statement of the case.....	3
I. Statement of facts .....	4
A. Background: the Company’s operations; its relationship with producers; its prior relationship with the Union .....	4
B. Productions at the Theatre in 2014 and 2015.....	7
II. Procedural history .....	8
A. The representation proceeding .....	8
B. The unfair-labor-practice proceeding.....	9
III. The Board’s conclusions and Order.....	9
Standard of review .....	10
Summary of argument.....	12
Argument.....	14
The Board acted within its broad discretion in certifying the Union, and therefore properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union .....	14
A. Acting within its broad discretion in unit-determination cases, the Board reasonably found the petitioned-for unit appropriate .....	16
1. The Board possesses broad discretion in determining whether the petitioned-for unit is appropriate under the Act .....	16

**TABLE OF CONTENTS**

<b>Headings-Cont'd</b>	<b>Page(s)</b>
2. The petitioned-for unit of musicians employed by the Company is appropriate.....	17
3. The Company’s remaining challenges to the appropriateness of the unit lack merit.....	25
B. The Board acted within its broad discretion in conducting the election among employees who met the <i>Juilliard School</i> voter-eligibility formula, which promotes enfranchisement in the entertainment industry .....	29
1. The Board possesses broad discretion in determining the appropriate voter-eligibility formula to apply in a given case ...	30
2. The Board reasonably applied the <i>Juilliard School</i> eligibility formula to hold an election among musicians who met that standard at the relevant time.....	32
C. The Board properly granted summary judgment.....	35
Conclusion .....	41

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>Am. Hosp. Ass’n v. NLRB</i> , 499 U.S. 606 (1991).....	16
<i>BB&amp;L, Inc. v. NLRB</i> , 52 F.3d 366 (D.C. Cir. 1995).....	30
<i>BFI Newby Island Recyclery</i> , 362 NLRB No. 186, 2015 WL 5047768 (Aug. 27, 2015), <i>petition for review &amp; cross-application filed</i> , D.C. Cir. Nos. 16-1028, 16-1063, 16-1064.....	17, 23
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964).....	2
<i>Cent. Transp., Inc.</i> , 328 NLRB 407 (1999).....	18, 21
<i>CNN Am., Inc.</i> , 361 NLRB No. 47, 2014 WL 4545618 (Sept. 15, 2014), <i>enforcement denied in relevant part</i> , 865 F.3d 740 (D.C. Cir. 2017).....	19
<i>Columbus Symphony Orchestra, Inc.</i> , 350 NLRB 523 (2007).....	31
<i>Davison-Paxon, Co.</i> , 185 NLRB 21 (1970).....	31
<i>DIC Entm’t LP</i> , 328 NLRB 660 (1999), <i>enforced</i> , 238 F.3d 434 (D.C. Cir. 2001).....	31
<i>DIC Entm’t, LP v. NLRB</i> , 238 F.3d 434 (D.C. Cir. 2001).....	31

**TABLE OF AUTHORITIES**

<b>Cases -Cont'd</b>	<b>Page(s)</b>
<i>Flagstaff Med. Ctr., Inc.</i> , 357 NLRB 659 (2011), <i>enforcement granted in part, denied in part</i> , 715 F.3d 928 (D.C. Cir. 2013).....	17
<i>Freund Baking Co.</i> , 330 NLRB 17 (1999).....	3
<i>Friendly Ice Cream Corp. v. NLRB</i> , 705 F.2d 570 (1st Cir. 1983).....	11, 16, 17, 29
<i>Gourmet Award Foods, Ne.</i> , 336 NLRB 872 (2001).....	24, 25
<i>Greenhoot, Inc.</i> , 205 NLRB 250 (1973).....	25
<i>Intercity Maint. Co. v. Local 254, Serv. Emps. Int’l Union</i> , 241 F.3d 82 (1st Cir. 2001).....	28
<i>Juilliard Sch.</i> , 208 NLRB 153 (1974).....	12, 13, 15, 29, 31, 32, 33, 34, 35, 37, 38
<i>Kan. City Repertory Theatre, Inc.</i> , 356 NLRB 147 (2010).....	24, 34, 35
<i>King Elec. Inc.</i> , 343 NLRB No. 54, 2004 WL 2461360 (Oct. 29, 2004), <i>enforcement denied on other grounds</i> , 440 F.3d 471 (D.C. Cir. 2006).....	38
<i>Kirkpatrick Elec. Co.</i> , 314 NLRB 1047 (1994).....	39
<i>Lamons Gasket Co.</i> , 357 NLRB 739 (2011).....	38

**TABLE OF AUTHORITIES**

<b>Cases -Cont'd</b>	<b>Page(s)</b>
<i>Lancaster Symphony Orchestra</i> , 357 NLRB 1761 (2011).....	24
<i>Marriott In-Flite Servs. v. NLRB</i> , 652 F.2d 202 (1st Cir. 1981).....	11
<i>Mass. Soc’y For Prevention of Cruelty To Children v. NLRB</i> , 297 F.3d 41 (1st Cir. 2002).....	11, 16, 17, 29, 36
<i>McGaw of P.R., Inc. v. NLRB</i> , 135 F.3d 1 (1st Cir. 1997).....	10
<i>Moses Elec. Serv., Inc.</i> , 334 NLRB 567 (2001).....	20
<i>NLRB v. Atkinson Dredging Co.</i> , 329 F.2d 158 (4th Cir. 1964).....	32
<i>NLRB v. Horizons Hotel Corp.</i> , 49 F.3d 795 (1st Cir. 1995).....	14-15
<i>NLRB v. Ne. Land Servs., Ltd.</i> , 645 F.3d 475 (1st Cir. 2011).....	10, 11
<i>NLRB v. Solutia, Inc.</i> , 699 F.3d 50 (1st Cir. 2012).....	10
<i>NLRB v. Westinghouse Broad. &amp; Cable, Inc.</i> , 849 F.2d 15 (1st Cir. 1988).....	11, 35
<i>Pittsburgh Plate Glass Co. v. NLRB</i> , 313 U.S. 146 (1941).....	36
<i>Ray Brooks v. NLRB</i> , 348 U.S. 96 (1954).....	38

**TABLE OF AUTHORITIES**

<b>Cases -Cont'd</b>	<b>Page(s)</b>
<i>Rice Growers Ass'n of Cal., Inc.</i> , 312 NLRB 837 (1993) .....	39
<i>S. Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs</i> , 425 U.S. 800 (1976).....	16
<i>Sandvik Rock Tools, Inc. v. NLRB</i> , 194 F.3d 531 (4th Cir. 1999) .....	16
<i>Sitka Sound Seafoods, Inc. v. NLRB</i> , 206 F.3d 1175 (D.C. Cir. 2000).....	30
<i>Storall Mfg. Co.</i> , 275 NLRB 220 (1985) .....	20
<i>Telemundo de P.R., Inc., v. NLRB</i> , 113 F.3d 270 (1st Cir. 1997).....	15
<i>Trump Taj Mahal Assocs.</i> , 306 NLRB 294 (1992) .....	30
<i>U.S. Recycling &amp; Disposal, LLC</i> , 351 NLRB 1090 (2007) .....	28
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	10, 11
<i>Westinghouse Elec. Corp.</i> , 179 NLRB 289 (1969) .....	39

**TABLE OF AUTHORITIES**

<b>Statutes:</b>	<b>Page(s)</b>
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 1 (29 U.S.C. § 151) .....	30
Section 2(11) (29 U.S.C. § 152(11)).....	23
Section 7 (29 U.S.C. § 157) .....	10, 14
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	3, 4, 9, 10, 14, 15, 36
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	3, 4, 9, 10, 14, 15, 36
Section 9(b) (29 U.S.C. § 159(b)).....	16
Section 9(c) (29 U.S.C. § 159(c)) .....	3, 8
Section 9(c)(3) (29 U.S.C. § 159(c)(3)).....	38
Section 9(d) (29 U.S.C. § 159(d)).....	2, 3
Section 10(a) (29 U.S.C. § 160(a)) .....	2
Section 10(e) (29 U.S.C. § 160(e)).....	2, 10

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

---

**No. 17-1650**

---

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

**and**

**BOSTON MUSICIANS' ASSOCIATION, LOCAL 9-535**

**Interested Party - Intervenor**

**v.**

**THE WANG THEATRE, INC.**

**Respondent**

---

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) for enforcement of a Board Decision and Order issued against The Wang Theatre, Inc., d/b/a Citi Performing Arts Center (“the

Company”) on November 10, 2016, and reported at 364 NLRB No. 146. The Board had subject matter jurisdiction over the proceeding below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. § 151, et seq. The Court has jurisdiction over this proceeding under Section 10(e) of the Act, 29 U.S.C. § 160(e), because the Board’s Order is final and the unfair labor practice occurred in Boston, Massachusetts. The Board’s application was timely because the Act places no time limit on the initiation of enforcement proceedings. The charging party before the Board, Boston Musicians’ Association, affiliated with the American Federation of Musicians, Local Union No. 9-535, AFL-CIO (“the Union”), has intervened in support of the Board.

As the Board’s unfair-labor-practice Order is based, in part, on findings made in an underlying representation (union election) proceeding (Add. 14),<sup>1</sup> the record in that proceeding (Board Case No. 01-RC-166997) is also before the Court pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Under Section 9(d), the Court has jurisdiction to review the Board’s actions in the representation proceeding solely for the

---

<sup>1</sup> “Add.” references are to the Addendum to the Company’s opening brief (“Br.”). “A.” references are to the joint appendix. “UBr.” references are to the Union’s intervenor brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

purpose of “enforcing, modifying or setting aside in whole or in part the [unfair-labor-practice] order of the Board.” 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

### **STATEMENT OF THE ISSUES**

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

1. Whether the Board acted within its broad discretion in finding the petitioned-for unit appropriate.
2. Whether the Board acted within its broad discretion in conducting the election among employees who met the established voter eligibility formula, which promotes enfranchisement.

### **STATEMENT OF THE CASE**

This unfair-labor-practice case arises from the Company’s admitted refusal to recognize or bargain with the Union as the certified representative of its musicians. In the underlying representation proceeding, the Board rejected the

Company's challenges to the Union's certification. (Add. 14 & n.1.) Having rejected those challenges, the Board held (Add. 15) that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). The facts and procedural history relevant to both the representation and unfair-labor-practice proceedings are set forth below.

## **I. STATEMENT OF FACTS**

### **A. Background: the Company's Operations; Its Relationship with Producers; Its Prior Relationship with the Union**

The Company operates The Wang Theatre ("the Theatre"), a performance venue located in Boston, Massachusetts. (Add. 1; A. 22.) The Theatre hosts theatrical performances, including musical productions, as well as concerts, dance shows, and "star attractions," performances by well-known musicians. (Add. 1; A. 23.) Musical productions typically run for two to three weeks, with eight performances each week. (Add. 2; A. 180.)

The Company itself does not produce the performances held at the Theatre; instead, it contracts with independent producers, who bring events to the venue. (Add. 1; A. 22-23.) The Company's contracts with producers consist of two general types. (Add. 1; A. 24-26.) Under the first type, known as a "four-wall rental," the producer (also known as a promoter) pays to rent the Theatre, assumes all expenses for the production, and reaps all of the profits from the performances. (Add. 1-2; A. 25, 37.) Under the second type of contract, the Company acts as a

promoter and shares the expenses and revenues of a production with the producer.

(Add. 2; A. 26.)

Producers have artistic control over the productions that they bring to the Theatre, including choosing between live or recorded music. (Add. 2, 3; A. 22, 29.) If live music is chosen, producers also determine whether to hire local musicians and, if so, how many.<sup>2</sup> (Add. 2, 3; A. 27.) Typically, producers supply at least some of the necessary musicians, known as “traveling musicians,” who tour with the production.<sup>3</sup> (Add. 2; A. 26.) To supplement the traveling musicians, or in some cases to provide all of the musicians for a production, producers either directly hire local musicians or they request that the Company do so. (Add. 2 & n.3; A. 27, 195, 220.) When the latter happens, the Company uses a local contractor—who is its employee—to hire the number and type of musicians specified by the producer. (Add. 2; A. 27-28, 56-57.) Finally, producers directly employ the conductor, who has artistic control over the musicians’ performance

---

<sup>2</sup> Whether a producer hires local musicians may be determined by a contract (if one exists) between the producer and the American Federation of Musicians, a national organization representing musicians (with which the Union is affiliated). (Add. 2 n.2.; A. 62-64, 67.) Specifically, Rule 24 of “Pamphlet B” of the contract addresses the hiring of local musicians, including dictating the number of local hires, and establishes requirements for laying off traveling musicians and hiring local ones in their place. (Add. 2 n.4; A. 64, 113.)

<sup>3</sup> Traveling musicians are paid according to either Pamphlet B or a Short Engagement Tour (“SET”) Agreement, which set forth the wages and working conditions for traveling musicians. (Add. 2 n.4; A. 63-64, 68.)

regardless of whether they are traveling musicians or local musicians. (Add. 3; A. 30, 31-32.)

From 2004 to 2007, the Company and the Union were parties to a collective-bargaining agreement that covered locally hired musicians. (Add. 2; A. 30, 102-39.) The agreement addressed a wide variety of subjects, including staffing levels, discipline, overtime compensation and holiday pay, premium pay for musicians who played multiple instruments or who had to play onstage or in costume, timing of rehearsals, insurance coverage for instruments, and pension contributions. (A. 102-23, 126-27.)

Although the parties negotiated for a successor agreement, they ultimately did not reach consensus over its terms and have had no contractual relationship since the prior agreement expired in December 2007. (Add. 2; A. 30-31.) After the prior bargaining agreement expired, there has been no change to the procedures for hiring local musicians or to the respective rights of the Company and the producers with which it contracts. (Add. 2; A. 37-38.) Both then and now, producers determine how many musicians a production requires and the number of local musicians to hire, if any, and locally hired musicians are paid according to the local union wage scale even without a bargaining agreement. (Add. 2; A. 28.)

The Company has collective-bargaining agreements with other unions that represent its employees in various positions, from stagehands, to ushers, to ticket

takers as well as those in wardrobe, the box office, and who load and unload equipment from trucks. When a producer contracts to use the Theatre, the Company provides the foregoing employees and the producer must assume their contractual costs. (Add. 3; A. 25, 54-55.)

For its part, the Union has a bargaining agreement with the Boston Opera House and previously had an agreement with the operator of the Shubert Theatre in Boston. Both venues present productions similar to those held at the Theatre and both have contracts with producers that are similar, or identical, to the agreements between the Company and the producers with which it contracts. (Add. 2; A. 22, 69-70, 74-76, 278-303.)

**B. Productions at the Theatre in 2014 and 2015**

In 2014, there were 21 productions at the Theatre. (Add. 2; A. 180.) Of those, two productions—*Annie* and *White Christmas*—utilized local musicians. (Add. 2; A. 31, 180.) For *Annie*, the Company hired eight local musicians while five musicians traveled with the show. (Add. 2; A. 31, 220.) For *White Christmas*, the Company hired 13 local musicians while 2 musicians traveled with the show. (Add. 2; A. 32, 195.) Some musicians worked on both productions. (Add. 2; A. 182-87.) In total, the Company hired at least 17 local musicians, who worked between 19 and 105 cumulative hours for the 2 productions, each of which ran for 16 performances. In 2015, there were 22 productions at the Theatre; none included

local musicians hired by the Company. (Add. 2; A. 31, 180.) For the 2015 production of *Elf*, the producer directly hired eight local musicians and the Company reimbursed the producer. (Add. 2 n.3; A. 34, 50-52, 257.)

## II. PROCEDURAL HISTORY

### A. The Representation Proceeding

On January 5, 2016, the Union filed a petition under Section 9(c) of the Act, 29 U.S.C. § 159(c), seeking to represent a bargaining unit of the Company's musicians.<sup>4</sup> (A. 89.) The Company asserted the petition should be dismissed, contending that: 1) it had not employed any musicians in the sought-after unit since 2014; 2) no musicians would be eligible to vote in the election under any of the Board's eligibility formulas; and 3) a single-employer unit was inappropriate because multiple independent producers control the musicians' terms and conditions of employment. (A. 92-100.)

On January 28, 2016, after a hearing, the Board's Acting Regional Director for Region 1 issued a Decision and Direction of Election, finding that the Company had failed to carry its burden of demonstrating the foregoing contentions and that the petitioned-for unit was appropriate. (Add. 3-5.) The Company then requested review of the Acting Regional Director's decision. (A. 348.) While that

---

<sup>4</sup> The unit consists of "All musicians employed by [the Company] at its performance hall at 270 Tremont Street, Boston, Massachusetts, but excluding all other employees, guards and supervisors as defined in the Act." (Add. 6.)

request was pending, the Board's regional office conducted a mail-ballot election among the musicians (Add. 10-12), which the Union won by a vote of 9 to 0. (A. 384.) On March 30, 2016, the Board's Acting Regional Director certified the Union as the collective-bargaining representative of the Company's musicians. (A. 385.) On June 6, 2013, the Board (then-Chairman Pearce and Members Hirozawa and McFerran) denied the Company's request for review. (Add. 13.)

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

On June 10, 2016, the Union requested that the Company recognize and bargain with it as the musicians' exclusive representative. (Add. 15; A. 389.) The Company refused. (Add. 15; A. 390.) Based on an unfair-labor-practice charge filed by the Union, the Board's General Counsel issued a complaint alleging that the Company's refusal violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), and moved the Board for summary judgment. (Add. 14; A. 342-47, 391, 393-96.) The Company opposed the General Counsel's motion, reasserting its three-part challenge and raising additional arguments. (Add. 14 & n.1; A. 408, 414-19.)

### **III. THE BOARD'S CONCLUSIONS AND ORDER**

On November 10, 2016, the Board (then-Chairman Pearce and Members Miscimarra and McFerran)<sup>5</sup> issued its Decision and Order finding that the

---

<sup>5</sup> On April 26, 2017, Member Miscimarra was named Chairman.

Company had violated Section 8(a)(5) and (1) as alleged.<sup>6</sup> To remedy that unfair labor practice, the Board's Order requires the Company to cease and desist from failing and refusing to recognize and bargain with the Union or, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights, 29 U.S.C. § 157. (Add. 15.) Affirmatively, the Order directs the Company to bargain with the Union on request, to embody any resulting understanding in a signed agreement, and to post a remedial notice. (Add. 15-16.)

### STANDARD OF REVIEW

A “Board order must be enforced if the Board correctly applied the law and if its factual findings are supported by substantial evidence on the record.” *NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 478 (1st Cir. 2011). More specifically, “[a]s long as the Board’s interpretation of [the Act] is reasonably defensible, [the Court] will uphold the Board’s conclusions of law even if [it] would have reached a different conclusion.” *McGaw of P.R., Inc. v. NLRB*, 135 F.3d 1, 7 (1st Cir. 1997) (internal citation and quotation marks omitted). The Board’s findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *NLRB v. Solutia, Inc.*, 699 F.3d 50, 59-60 (1st Cir. 2012). A reviewing court may

---

<sup>6</sup> The Company subsequently filed a motion for reconsideration (A. 440-47), which the Board (Members Pearce and McFerran; Acting Chairman Miscimarra, concurring) denied on February 14, 2017. (Add. 17.)

not, in applying the substantial-evidence standard, displace the Board's choice "between two fairly conflicting views, even though the court [may] justifiably have made a different choice had the matter been before it de novo." *Ne. Land Servs.*, 645 F.3d at 478 (quoting *Universal Camera*, 340 U.S. at 488).

In the context of representation elections, the Board possesses broad discretion in determining whether a petitioned-for unit is appropriate and which voter eligibility formula to apply in order to promote employee enfranchisement. The Court "review[s] unit determinations only to assure that they are not 'unreasonable, made arbitrarily or capriciously, or unsupported by substantial evidence.'" *Mass. Soc'y For Prevention of Cruelty To Children v. NLRB*, 297 F.3d 41, 45 (1st Cir. 2002) (quoting *Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570, 574 (1st Cir. 1983)). "In recognition of the Board's expertise in this area, [the Court] may affirm the Board's action, even though [it] might not have reached the same unit determination." *Id.* (citing *Marriott In-Flite Servs. v. NLRB*, 652 F.2d 202, 207-08 (1st Cir. 1981)). Moreover, the wide degree of discretion that the Court accords to the Board's efforts to ensure fair and free representation elections also "encompasses its determination of voter eligibility issues." *NLRB v. Westinghouse Broad. & Cable, Inc.*, 849 F.2d 15, 18 (1st Cir. 1988).

## SUMMARY OF ARGUMENT

Acting within its broad discretion to make unit determinations, the Board reasonably found appropriate the petitioned-for unit of musicians employed by the Company. The Board reasonably rejected the Company's claim that the unit was inappropriate because it did not include the producers as employers. The Company failed to show that the producers, not it, control the musicians' employment terms. Moreover, the Company was the musicians' sole and undisputed employer for a three-year period when it was party to a collective-bargaining agreement with the Union that covered the petitioned-for unit. As the Company's vice president and general manager acknowledged, since the expiration of that agreement there has been no substantive change in the way it operates the Theatre or in its relationships with producers. The record further shows that, upon a producer's request for the number and type of local musicians, the Company directly chooses and hires them. Once hired, the musicians practice and perform at the Company's facility, are on the company payroll, and are compensated at the union wage scale. There was no evidence the producers exercise anything more than "artistic control" over the musicians.

Exercising its broad discretion in the election context, the Board also reasonably applied the established formula in *Juilliard School* to determine that there were eligible voters such that the election was properly held. The local

musicians work in the theater, which is subject to irregular work patterns. Thus, under established Board law, special circumstances warranted the application of a more inclusive eligibility formula, lest the musicians be disenfranchised based on the characteristics of their profession. *Juilliard School's* formula is applicable to the case, with the evidence meeting that standard as the Company employed some local musicians in the petitioned-for unit for at least 15 days within the relevant 2-year period, making those individuals eligible to vote. In the relevant prior two-year period, the Company hired local musicians twice, for productions of *Annie* and *White Christmas*. Accordingly, the Board properly found that there were eligible unit voters and held the election.

The Company's challenges rest on several flawed and unproven claims. Contrary to its speculation that the Union will demand bargaining over impossible or unlawful terms and conditions, the evidence shows that there is no reason to doubt that the Company and the Union will be able to engage in meaningful bargaining, as they did before in reaching a three-year agreement. Likewise, the Company wrongly asserts that the Board's application of *Juilliard School* and holding an election broke new ground where there has been no bargaining-unit work within the year preceding the election. As the Board found, that argument lacks any support in Board precedent and is contrary to *Juilliard School*, which expressly permits elections in those circumstances.

Finally, there is also no merit to the Company's remaining argument that, notwithstanding the validity of the Union's certification, summary judgment was improper and the Board erred in finding that it had violated Section 8(a)(5) of the Act. As the Board found, that argument rests on the Company's legally irrelevant claim that no election should have been held because there was no unit work during the prior year, and its meritless claim the Union has not sought bargaining over employment terms that it controls; those claims were raised and properly rejected in the underlying representation case.

### ARGUMENT

#### **THE BOARD ACTED WITHIN ITS BROAD DISCRETION IN CERTIFYING THE UNION, AND THEREFORE PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION**

Section 7 of the Act grants employees the right to choose a representative and to have that representative bargain with their employer on their behalf.

29 U.S.C. § 157. Employers have a corresponding duty to bargain with their employees' chosen representatives, and a refusal to bargain violates that duty under Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1).<sup>7</sup> *See*

---

<sup>7</sup> A violation of Section 8(a)(5) creates a "derivative" violation of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), which makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7" of the Act. *See NLRB v. Horizons Hotel Corp.*, 49 F.3d 795, 806 (1st Cir. 1995).

*NLRB v. Horizons Hotel Corp.*, 49 F.3d 795, 806 (1st Cir. 1995). Here, the Company does not dispute that it refused to bargain with the Union. Rather, it challenges the validity of the Board's certification of the Union as well as separately claims that its refusal to bargain is lawful, reiterating claims previously rejected by the Board in the representation case. Unless the Company prevails in that challenge, its admitted refusal to bargain violates Section 8(a)(5) and (1) of the Act, and the Board is entitled to enforcement of its Order. *See, e.g., Telemundo de P.R., Inc., v. NLRB*, 113 F.3d 270, 272, 279 (1st Cir. 1997). As the following discussion demonstrates, the Board acted within its broad discretion in the election context in finding the petitioned-for unit appropriate as a single-employer unit and applying the voter-eligibility formula set forth in *Juilliard School*, 208 NLRB 153 (1974), such that there were eligible voters to make an election possible. The Company's separate challenge to the Board's granting of summary judgment as to the bargaining violation also essentially reiterates the arguments raised and rejected in the representation case. Therefore, its refusal to recognize or bargain with the Union violates the Act.

**A. Acting Within Its Broad Discretion in Unit-Determination Cases, the Board Reasonably Found the Petitioned-For Unit Appropriate**

**1. The Board possesses broad discretion in determining whether the petitioned-for unit is appropriate under the Act**

Section 9(b) of the Act empowers the Board to decide “in each case” whether the petitioned-for unit is “appropriate for purposes of collective bargaining” in order to “insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of th[e] Act . . . .” 29 U.S.C. § 159(b). *See generally Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 610-11 (1991) (discussing Section 9(b)). Given that explicit statutory language, “[i]t is now well settled that ‘the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, if not final, is rarely to be disturbed.’” *Mass. Soc’y*, 297 F.3d at 45 (quoting *S. Prairie Constr. Co. v. Local 627, Int’l Union of Operating Eng’rs*, 425 U.S. 800, 805 (1976)). *See also Sandvik Rock Tools, Inc. v. NLRB*, 194 F.3d 531, 534 (4th Cir. 1999) (noting Supreme Court’s historic support for according Board “widest possible discretion” in determining appropriate bargaining unit).

In addition, it is also settled that in exercising its broad discretion, the Board “is not required to select the most appropriate unit in a particular factual setting; it need only select *an* appropriate unit from the range of units appropriate under the circumstances.” *Friendly Ice Cream*, 705 F.2d at 574. *See also Mass. Soc’y*, 297

F.3d at 45 (citing *Friendly Ice Cream*). In light of the Board’s broad discretion, and consistent with the deferential standard of review, “an employer seeking to disturb the Board’s unit determination cannot merely point to a more appropriate unit; rather, ‘the burden of proof is on the employer to show that the Board’s unit is *clearly inappropriate.*’” *Mass. Soc’y*, 297 F.3d at 45 (quoting *Friendly Ice Cream*, 705 F.2d at 574).

**2. The petitioned-for unit of musicians employed by the Company is appropriate**

Exercising its broad discretion, the Board reasonably found (Add. 3, 4) that the petitioned-for unit is appropriate, rejecting the Company’s claim that there was no appropriate unit because the producers control the musicians’ employment terms and thus the Company is not their sole employer. In making that determination, the Board found (Add. 4) an “absence of any clear evidence that the producers control or even affect the terms of employment for musicians, [and thus] the [Company] has not demonstrated the existence of a joint employer relationship,” a status that it bore the burden of establishing. *See BFI Newby Island Recyclery*, 362 NLRB No. 186, 2015 WL 5047768, at \*22 (Aug. 27, 2015) (citing *Flagstaff Med. Ctr., Inc.*, 357 NLRB 659, 666 (2011), *enforcement granted in part, denied in part*, 715 F.3d 928 (D.C. Cir. 2013)), *petition for review & cross-application filed*, D.C. Cir. Nos. 16-1028, 16-1063, 16-1064 (argued Mar. 9, 2017). The Board therefore found the petitioned-for unit of musicians employed by the

Company “a single-employer unit” and “presumptively appropriate under the Act” (Add. 4 (citing *Cent. Transp., Inc.*, 328 NLRB 407, 408 (1999))). The Company had not shown otherwise.

The Board’s finding that the unit is an appropriate one is reasonable given the record evidence. First, the Company was the musicians’ undisputed—and sole—employer for a three-year period, from 2004 through 2007, when it was party to a bargaining agreement covering the petitioned-for unit. (Add. 3-4; A. 30, 102-34, 139.) As shown (p. 6), that agreement covered the types of terms and conditions of employment an employer and its employees’ union would bargain over and embody in an agreement, such as benefits, wages, hours, and discipline. (A. 102-05.) Moreover, the Company’s own witness—its vice president and general manager (A. 205)—acknowledged that since the expiration of the prior bargaining agreement, the Theatre operates in the same manner and nothing was different as to the respective responsibilities and authority of the producers and the Company. (Add. 3-4; A. 37-38.) Thus, the Board found that the situation “remain[s] unchanged.” (Add. 4.) As the Board then aptly observed (Add. 4), “[i]f it was appropriate then for the [Union] to represent and bargain on behalf of the musicians at issue here, then it is still appropriate today.”

There is no basis to the Company’s assertion (Br. 20) that the Board improperly relied on the “long-expired” bargaining agreement, which it labels

“irrelevant.” In making that argument, the Company conveniently omits its own witness’ aforementioned concession that nothing has changed since that agreement expired with respect to the Company’s operation of the Theatre and the respective responsibilities and authority of the producers and it.<sup>8</sup> Thus, under the facts here, that agreement remains relevant. Accordingly, because there have been no relevant changes since that collective-bargaining agreement was in place, its reliance on *CNN* to assert that the agreement is irrelevant and employer status is determined at the time of the representation case does not advance its cause. *CNN Am., Inc.*, 361 NLRB No. 47, 2014 WL 4545618, at \*9 (Sept. 15, 2014), *enforcement denied in relevant part*, 865 F.3d 740, 751 (D.C. Cir. 2017) (Board departed from its joint-employer standard without explanation).<sup>9</sup>

---

<sup>8</sup> The Company misrepresents (Br. 20) the record in claiming that “unrebutted testimony” showed that the agreement lapsed because the Company “does not control the use of music *or musicians*” at the Theatre (emphasis added). When asked what issues the Company felt it “couldn’t control or . . . didn’t want to bargain over,” the witness mentioned nothing about *controlling musicians*, citing only that the producer determined “[w]hether there were live musicians, . . . the number of musicians to be employed.” (A. 30-31.)

<sup>9</sup> In determining whether CNN and its contractor TVS were joint employers, the Board found that neither the union certification with TVS’ predecessors (designating the predecessors as “‘employer,’ not CNN”) almost 20 years prior to CNN’s unfair labor practices, nor the bargaining history between the union and a series of TVS’ predecessors, were dispositive of the joint-employer issue. 2014 WL 4545618, at \*9. As the Board reasoned, that evidence concerned different parties and a time removed from the unfair labor practices. *Id.*

Next, the Board found (Add. 3) that “it appears that the [Company] hires the employees and as such clearly is an employer under the Act.” Thus, the evidence shows that a company employee exercises discretion in choosing which available local musicians to hire for a production, because the producer only provides the number and type of musicians needed. (A. 27-28, 56-57.) Once hired by the Company, musicians then practice and perform at its facility and are paid the local union wage scale through the company payroll. (A. 28, 184-87.)

The Company misses the mark (Br. 19) in arguing that there can be no employer-employee relationship where an entity, such as itself, is a “mere payroll employer.” Here, however, the Board’s decision is supported by more than just evidence that the Company places the musicians on its payroll and pays them through it.<sup>10</sup> As discussed (pp. 18-20), other evidence of its status as an employer includes the prior bargaining agreement encompassing typical employment terms, the concession that the relationship between the Company and producers remains

---

<sup>10</sup> The Company’s cited (Br. 19) cases do not advance its claim that it is a mere payroll employer or agent of the producers; those cases are plainly distinguishable. In one, there was no claim that a staffing company was an employer or joint employer; it merely received applications, sometimes checked references but did not screen applicants, and referred the applicants to the actual employer for a fee. *Moses Elec. Serv., Inc.*, 334 NLRB 567, 572-73 (2001). In the other, the Board found that the evidence failed to support the judge’s finding of joint employer status; that the entity provided temporary employees and handled “administrative paperwork, skill qualifying, interviewing, reference, verification, payroll, and insurance,” only showed its status as an agent to the actual employer. *Storall Mfg. Co.*, 275 NLRB 220, 221 n.3 (1985).

unchanged since then, and the Company possessing discretion when it hires the musicians. Likewise, contrary to its claim (Br. 19), the foregoing shows that in finding the unit appropriate, the Board did not “solely” rely on evidence that the Company uses an employee to hire the musicians.

Further, in finding the unit appropriate, the Board reasonably rejected (Add. 3) the Company’s position that there is no appropriate bargaining unit because it is not the musicians’ sole statutory employer.<sup>11</sup> Specifically, the Company claimed that the producers have “ultimate control” over key employment terms, determine whether and how many musicians to hire, sometimes directly hire them, and provide their sole direction and supervision. (Add. 3.)

As the Board first found (Add. 3), there “is little evidence in the record concerning the traditional indicia of the employer-employee relationship relative to the producers” and the local musicians. Thus, although the Company claimed that the producer has sole discretion over whether any local musicians need to be hired, the Board found (Add. 3) that “this term of employment is ultimately determined by the contract negotiated between the [Company] and the producer.” As the record shows, the Company (through its counsel) drafts those contracts. (A. 43,

---

<sup>11</sup> To the extent the Company implicitly argued in favor of a multiemployer unit, the Board found (Add. 4) no basis for such a claim because there was “no evidence of a history of bargaining on a multiemployer basis,” as required by Board law. *See Cent. Transp.*, 328 NLRB at 408.

46-47, 49.) Accordingly, there may be some variability in the producers' discretion. The Board further found (Add. 3) that claim undermined by the foregoing evidence that once a producer indicates the number and type of musicians needed, "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 . . . ." To the contrary, as shown, the Company exercises discretion in choosing which local musicians to hire. In addition, while acknowledging that the producer's conductor exercises "artistic control" over the musicians, the Board found (Add. 3) that there was "no evidence indicating where other traditional supervisory authority lies," except for evidence that the Company hires the musicians.<sup>12</sup>

Although the Company asserts (Br. 24) that the "producers' personnel . . . supervised and directed" the musicians, the Board properly found that the record only shows that the conductors exercise "artistic control" over the musicians, meaning control with respect to their performance. (Add. 3; A. 29-32.) There was "no evidence" indicating whether conductors possess any supervisory authority other than artistic control.<sup>13</sup> (Add. 3.) The Company's claim (Br. 24) that

---

<sup>12</sup> The Company thus overstates (Br. 24) the decision as having "conceded that there was no evidence 'traditional supervisory authority' lay with [the Company]."

<sup>13</sup> Under the Act, indicia of supervisory status include the authority "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline

“producers thus had relevant ‘potential’ control over discipline” is undercut by the prior bargaining agreement, in which it explicitly reserved to itself disciplinary authority. (A. 126-27).<sup>14</sup>

*BFI*, cited by the Company (Br. 24), is not to the contrary. There, *BFI*’s agreement with the putative joint employer established its potential control over discipline because the agreement expressly granted *BFI* an “unqualified right to ‘discontinue the use of any personnel’” assigned to it by the other employer. *BFI*, 2015 WL 5047768, at \*22. If anything, the language about the Company’s control and discipline in the prior bargaining agreement is in line with *BFI*’s discussion of “potential control” being shown in a contract and reinforces that the Company is the entity with potential control over discipline, not the producers.

Similarly, although the Company claims (Br. 24)—without supporting record citations—that the producers have “control over [musicians’] qualifications,” the evidence establishes that the producers only indicate the number and type of musicians needed while the Company’s employee decides which available musicians to hire. (A. 27-28, 56-57.) In light of the paucity of

---

other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C. § 152(11).

<sup>14</sup> A section of the bargaining agreement titled “Control of Musicians” provided that “[t]he [Company] shall at all times have complete control of the services rendered by its Musicians under this Agreement.” (A. 118.)

evidence that the producers actually control the musicians' terms and conditions of employment, the Company's reliance (Br. 20) on *Lancaster Symphony Orchestra*, 357 NLRB 1761 (2011), is misplaced.<sup>15</sup> That case concerned the separate legal question of whether the musicians were employees or independent contractors. Moreover, it was replete with evidence establishing that the musicians were employees of that orchestra, including that it determined which musicians to hire, maintained extensive guidelines for behavior, and had imposed and threatened discipline for violating its rules. *Id.* at 1763-64. Thus, in finding those musicians to be employees, the case did not solely turn on artistic control, which is what the Company urges here.

Furthermore, having failed to adduce evidence demonstrating the producers' control over the musicians' employment terms, the Company cannot shirk its burden by contending (Br. 22) that "as a matter of basic logic," it cannot be the sole employer because producers have "substantially more relevant control." Lacking such evidence, its cited cases (Br. 22) are distinguishable because they contain ample evidence establishing joint-employer status. Thus, in *Gourmet Award Foods, Northeast*, 336 NLRB 872, 873 (2001), the Board found that

---

<sup>15</sup> Contrary to its suggestion (Br. 21), the Board did not rely on *Kansas City Repertory Theatre, Inc.*, 356 NLRB 147 (2010), in finding the petitioned-for unit appropriate. The issue in that case was which voter-eligibility standard to apply, and the Board here cited (Add. 4-5) it on that basis. *See id.* at 147, 149.

temporary employees were jointly employed by staffing agencies and employer Gourmet. The agencies recruited and hired them, determined their pay, issued their paychecks, paid their workers' compensation, and made other payroll deductions while Gourmet assigned their work, provided day-to-day supervision, and determined hours and scheduling, including overtime. *Id.* Significantly, through its labor-relations policies that applied to the temporary workers, Gourmet had "the authority to discipline them for poor performance or rules infractions." *Id.* Likewise, in *Greenhoot, Inc.*, 205 NLRB 250, 250-51 (1973), the Board found that Greenhoot, a property management company, and individual building owners were the joint employers of maintenance employees. Greenhoot was the building owners' agent with express authority to hire, fire, and supervise those employees, but at the same time the owners retained certain rights, including approval of hiring and retention of all building employees, and setting pay rates. *Id.* The record here does not show that the producers exercised control similar to that shown in *Gourmet Award Foods* and *Greenhoot*.

### **3. The Company's remaining challenges to the appropriateness of the unit lack merit**

There is no merit to the Company's legal assertion (Br. 25) that without the inclusion of the producers as employers, the unit is inappropriate as a matter of law. That assertion rests on its twin arguments (Br. 25-30, 33) that the approved unit is inappropriate because, (1) where the producers assertedly control the

musicians' employment terms, the Union will be unable to engage in meaningful bargaining with the Company and (2) the Union will (and can only) pursue unlawful bargaining directed at the producers. Principally, as the Board reasoned (Add. 14), the Company's underlying—and oft repeated—contention (Br. 26, 28, 33) that the producers, and not it, control the musicians' employment terms was raised and rejected in the representation proceeding, as discussed (pp. 17-22). Although the Company claims (Br. 27-28, 33-34) that the Union necessarily will seek to bargain over terms and conditions of employment outside its control, that claim is speculative when it has to date refused even to begin the bargaining process.

The Company asks (Br. 34) “[w]hat could the parties possibly bargain over, lawfully?” while claiming that “even the Board could not identify anything” (Br. 28, 34). One answer is found in the parties' prior bargaining agreement, which the Board relied upon in its decision (Add. 3-4). As the record establishes, the Company and the Union were parties to an agreement that included a bevy of terms and conditions of employment that the Company controlled and previously bargained over with the Union. (A. 102-34.) As shown, since that agreement's expiration, the Company's own witness conceded that nothing has changed with respect to either the Company's operations or the relationship between the Company and the producers. The Company has failed to demonstrate that it no

longer controls, and thus cannot bargain over, terms and conditions. Although the Company claims (Br. 23) that unit work is dependent on the producers, who determine whether and how many local musicians to hire and sometimes directly hire musicians, those same conditions existed during the prior bargaining agreement's term. Therefore, there is no evidentiary or legal basis for concluding that the parties cannot once again bargain over the musicians' terms and conditions of employment and embody any consensus in a bargaining agreement. Also, as shown (p. 7), the Union has had agreements with other venues that maintain similar relationships with producers, which undercuts the Company's claim that a new bargaining agreement would be unworkable. And, if the Union were to seek bargaining over terms and conditions beyond the Company's control, it may file an unfair-labor-practice charge and litigate that claim in a subsequent proceeding.

There is also no merit to the Company's related claim (Br. 25, 28-29, 31) that the Union seeks an unlawful "hot cargo clause" prohibiting the Company from renting the Theatre to producers unless they agree to layoff traveling musicians and hire local ones. First and foremost, the Union's operative bargaining request contains no such demand. (A. 389.) To the contrary, it only requested that the Company "begin negotiations with [it] for a successor agreement." (A. 389.) The Company bases its speculative argument (Br. 29) on the opening statement of counsel for the Union, who was explaining to the hearing officer the complex

interplay among touring productions, the American Federation of Music, Pamphlet B, venue staffing, and the hiring of local musicians.<sup>16</sup> (A. 15-17, *see also* 12-15, 17-20.) Regardless, it is well established that statements by counsel are not evidence, *U.S. Recycling & Disposal, LLC*, 351 NLRB 1090, 1093 (2007); *Intercity Maint. Co. v. Local 254, Serv. Emps. Int’l Union*, 241 F.3d 82, 88 n.4 (1st Cir. 2001), let alone an operative bargaining demand. However, to the extent that the Union makes an assertedly unlawful bargaining demand in the future, the Company may, as noted, file an unfair-labor-practice charge over that conduct and litigate its claim in a subsequent proceeding.<sup>17</sup>

Finally, the Company inexplicably devotes several pages of its brief (Br. 25-30) to arguing that “even if” (Br. 30) the Board had found the musicians were

---

<sup>16</sup> In the course of doing so, Union counsel mentioned that producers typically have bargaining agreements *with the American Federation of Musicians* (not with the local Union here) that require the producer to lay off touring musicians, hire local ones, and apply the local venue’s bargaining agreement when a production comes to a “Rule 24” city, such as Boston. (A. 17.) When then explaining what would happen if a show were non-union (i.e. the producer had no contract with the American Federation of Music), counsel mentioned a specific bargaining agreement the Union has with an opera house, which requires non-union producers using that venue to lay-off half of the traveling musicians in favor of local ones. (A. 17-18.)

<sup>17</sup> Notwithstanding the Company’s (Br. 12, 29) and intervenor Union’s claims (UBr. 27-28 n.23), the lawfulness of such a demand has not been determined by the Board in this case. The mere possibility of such a future demand is not an impediment to enforcing the Company’s basic bargaining obligation now and thus its lawfulness is currently irrelevant. As described, should the issue arise in bargaining and be disputed, the parties could then litigate its lawfulness.

jointly employed, then such a unit would still be inappropriate and Board counsel cannot present a “post-hoc argument” that such a unit is appropriate. The Board, however, did not find that the Company and producers are joint employers, nor is Board counsel making that argument.

Accordingly, because the Company failed to prove its claims regarding the producers’ control, the Board reasonably found the petitioned-for unit appropriate, and before the Court the Company has not carried its burden of “‘show[ing] that the Board’s unit is *clearly inappropriate*.’” *Mass. Soc’y*, 297 F.3d at 45 (quoting *Friendly Ice Cream*, 705 F.2d at 574).

**B. The Board Acted Within Its Broad Discretion in Conducting the Election Among Employees Who Met the *Juilliard School* Voter-Eligibility Formula, Which Promotes Enfranchisement in the Entertainment Industry**

Having found the petitioned-for unit appropriate, the Board next reasonably determined that it was appropriate to apply the voter eligibility formula in *Juilliard School*, based on the facts of the case. Applying that formula, the Board found that musicians in the petitioned-for unit were eligible to vote and, therefore, ordered an election. The Company does not dispute the Board’s former finding that musicians were eligible to vote; rather, it challenges the Board’s decision to order an election based on its assertion that there was no unit work. As will be shown, because musicians were eligible to vote in the election pursuant to *Juilliard School*, the Company’s claim that no election should have been ordered is without merit.

**1. The Board possesses broad discretion in determining the appropriate voter-eligibility formula to apply in a given case**

As discussed, Congress has charged the Board with the protection of employee freedom of choice in the selection of a bargaining representative. *See* 29 U.S.C. § 151. To implement this statutory guarantee, the Board utilizes eligibility formulas that enfranchise the greatest number of employees with an ongoing interest in the bargaining unit. As the D.C. Circuit observed, the Board appropriately designs formulas that are “inclusive—not exclusive—[so as] to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment . . . .” *BB&L, Inc. v. NLRB*, 52 F.3d 366, 370 (D.C. Cir. 1995) (quoting *Trump Taj Mahal Assocs.*, 306 NLRB 294, 296 (1992)). Moreover, “[b]ecause each employment situation is different, the Board has an ‘obligation to tailor [its] general eligibility formulas to the particular facts of the case . . . .’” *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1178 (D.C. Cir. 2000) (quoting *BB&L*, 52 F.3d at 370). The Board therefore has fashioned formulas to take into account the nature of the work performed in a particular industry or facility. *See BB&L*, 52 F.3d at 371-72 (Board is entitled to “deviate[] from its usual formula . . . in cases involving . . . workers in an industry with irregular employment patterns”).

In the specific context of the entertainment industry, where irregular work patterns are typical, the Board has designed alternative voter eligibility formulas to account for those “special circumstances.” *Columbus Symphony Orchestra, Inc.*, 350 NLRB 523, 524 (2007). *See, e.g., DIC Entm’t LP*, 328 NLRB 660, 660 (1999) (employees in television-animation industry eligible if they worked on at least 2 productions for minimum of 5 working days during preceding 12 months, or at least 15 working days in last 12 months), *enforced*, 238 F.3d 434 (D.C. Cir. 2001). In *Juilliard School*, “casual” per diem theater employees worked on a repetitive basis and had a continuing interest in employment, but may not have been eligible under the Board’s standard formula for part-time employees.<sup>18</sup> 208 NLRB at 154-55. The Board therefore crafted an inclusive eligibility formula that permitted employees to vote if they had “been employed by the [employer] during two productions for a total of 5 working days over a 1-year period, or who [had] been employed by the [employer] for at least 15 days over a 2-year period.” *Id. at* 155. *See DIC Entm’t, LP v. NLRB*, 238 F.3d 434, 436 (D.C. Cir 2001) (discussing *Juilliard School*).

---

<sup>18</sup> In the context of on-call or part-time employees, the Board commonly applies its *Davison-Paxon* formula. *See Davison-Paxon, Co.*, 185 NLRB 21, 23-24 (1970) (employees eligible to vote if they “regularly average[] 4 or more hours of work per week for the last quarter prior to the eligibility date”).

By claiming that the Board improperly held the election when there was no unit work within the prior year, the Company disregards the Board's application of *Juilliard School*, which grants eligibility provided an employee worked 15 days within the prior 2 years. As will be discussed, *Juilliard School*, however, is the proper eligibility standard based on this case's facts, and the Company bore the burden of demonstrating that the Board's application of it was in error. *See NLRB v. Atkinson Dredging Co.*, 329 F.2d 158, 164 (4th Cir. 1964) (burden on aggrieved party "to show that the Board[']s determination of voting eligibility was erroneous, not on the Board to prove it correct").

**2. The Board reasonably applied the *Juilliard School* eligibility formula to hold an election among musicians who met that standard at the relevant time**

The Board reasonably found (Add. 4) that the eligibility formula set forth in *Juilliard School* was both "appropriate and applicable" in the present case. With regard to the Board's finding (Add. 4) that *Juilliard School* was appropriate because "special circumstance[s]" warranted an alternative, more inclusive eligibility formula, the evidence unquestionably shows that the local musicians work on an as-needed basis in the entertainment industry (namely, the theater), and as a result "work irregular employment patterns." (A. 22-23, 31-32.) In the two years preceding the underlying Decision and Direction of Election, the Company twice hired local musicians for producers (*Annie* and *White Christmas*), both times

in 2014. (A. 27, 195, 220.) Thus, as the Board found (Add. 5), absent the application of an alternative eligibility standard, employees may be disenfranchised simply because they work in the entertainment industry, which is subject to irregular and fallow periods of employment.

The evidence also supports the Board's subsequent finding (Add. 4-5) that the eligibility formula in *Juilliard School* was applicable to the petitioned-for unit of local musicians. Here, the Company employed some employees in the petitioned-for unit for at least 15 days within the preceding 2 years. *See Juilliard Sch.*, 208 NLRB at 155 (employees eligible to vote if "employed by the [employer] for at least 15 days over a 2-year period."). Specifically, as the Board found (Add. 4), once hired, local musicians rehearse and perform alongside traveling musicians for the duration of a musical production, which typically runs one to two weeks with multiple performances on certain days. (A. 31-32, 180.) Further, "for each of the two productions [*Annie* and *White Christmas*] in 2014 that used local musicians, employees in the proposed unit worked 16 performances, plus [an unknown number of] rehearsals." (Add. 5; A. 182-87.) Some musicians, moreover, worked both productions, for a total of 32 performances, plus rehearsals. (A. 182-87.) Accordingly, the record establishes, and the Company does not dispute, that at least some musicians in the petitioned-for unit met the *Juilliard School* eligibility standard for the relevant period. Under similar circumstances,

the Board found the application of the *Juilliard School* eligibility formula warranted where an employer hired musicians as needed for its annual musical production that ran between 25 and 40 performances, which then increased to three musicals in the year encompassing the representation proceeding. *Kan. City Repertory Theatre, Inc.*, 356 NLRB 147, 149-51 (2010).

The Board properly rejected the Company's claim (Br. 30-31) that, because there was no work in the unit within the prior year, the Board impermissibly found the Company's musicians eligible to vote. The Board acted well within its discretion (Add. 5) in refusing to adopt an "objective rule" prohibiting the holding of representation elections where the employer has not employed any employees in the petitioned-for unit within the prior year. As the Board reasoned (Add. 5), "such a rule has no support in Board precedent, and flies in the face of [*Juilliard 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."<sup>19</sup> Thus, *Juilliard School* shows that the Board contemplated voting eligibility even with no unit work within the prior year so long as there is 15 days of work over a 2-year period. *See* 208 NLRB at 155. Accordingly, that case "make[s] it clear that the Board

---

<sup>19</sup> In making the foregoing argument, the Company does not (Br. 30-33) challenge the validity of *Juilliard School*.

explicitly rejected the [Company's] reasoning.” (Add. 5.) Indeed, here, the Company cites no authority to suggest that the relevant period considered is, contrary to *Juilliard School's* clear language, limited to a year.

The Board, moreover, has addressed a similar continuing-interest challenge, also in the theater context, and found it wanting. As the Board reasoned, “[a]lthough the employees in the petitioned-for unit work intermittently, in many industries employees with little or no expectation of continued employment with a particular employer” nonetheless are able to “engage in stable and successful collective bargaining – for example, actors and construction workers, to name just two such groups.” *Kan. City Repertory Theatre*, 356 NLRB at 147. The Board went on to state that “[w]e believe the Act vests in such employees, rather than in the Board, the decision whether they will benefit from collective bargaining.” *Id.* As set forth above (pp. 11, 16-17, 30), the Board possess expertise in matters involving representation elections and the courts of appeals defer to the Board’s policy choices concerning representational issues, including with regard to voter eligibility. *See, e.g., Westinghouse*, 849 F.2d at 18.

### **C. The Board Properly Granted Summary Judgment**

There is no merit to the Company’s remaining arguments (Br. 31) that the Board’s granting of summary judgment was arbitrary and capricious. Specifically, the Company argues (Br. 31-33) that, notwithstanding the validity of the

certification of the Union, it has not violated Section 8(a)(5) and (1) of the Act because it has no duty to bargain over a unit—even a recently certified one—that has no employees. In support, it contends (Br. 32-33) that there will be no unit employees in the future because producers continue directly hiring local musicians. Likewise arguing (Br. 33) that summary judgment was improper, the Company asserts that “there could be no violation of the Act” on its part “unless and until” the Union sought to bargain over employment terms that it controlled.

Preliminarily, under well-established precedent, which the Company does not dispute (Br. 31), the Board found (Add. 14 & n.1) that the foregoing claims were not “properly litigable in [the] unfair labor practice proceeding” because they “were or could have been litigated in the underlying representation proceeding.” *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941) (absent exception, party cannot relitigate claim in unfair-labor-practice proceeding that was or could have been raised in representation proceeding); *Mass. Soc’y*, 297 F.3d at 49 (citing *Pittsburgh Plate Glass*). Because the Company offered no new evidence or alleged any special circumstances, the Board found no need to reexamine its decision in the representation case and there were no properly litigable issues in the unfair-labor-practice case. (Add. 14.) Accordingly, summary judgment was appropriate.

In considering the Company's claim that events since the representation case confirm its view that there are no unit employees, the Board reasonably rejected (Add. 14 n.1) as "mere speculation" the Company's claim about the future composition of the unit. The bargaining unit consists of "all musicians employed by [the Theatre] . . ." (Add. 15) and the collective-bargaining agreement between the Company and Union would cover such musicians. Even assuming that the Company has not employed any musicians since December 2014 as it claims (Br. 32), there is no reason to refuse to give effect to employees' votes based on speculation that no future producer will ever request local musicians.

Moreover, as discussed (p. 33), the evidence unquestionably shows that musicians in the petitioned-for unit were eligible to vote based on having worked 15 days during the relevant time period under *Juilliard School*, i.e. two years prior to the hearing and the Board's Decision and Direction of Election. Furthermore, as the Board reasoned (Add. 14 n.1), the Company "does not argue that under [the *Juilliard School* eligibility formula's two-year period] the unit lacked employees at the time of the election, at the time it refused the Union's bargaining request, or even currently."<sup>20</sup> Thus, even as late as the Board's unfair-labor-practice decision,

---

<sup>20</sup> The Company should not be heard to disparage (Br. 32, 33) the Board's finding of speculation by claiming the evidence now proves that "no one would satisfy the eligibility standard" in *Juilliard School* by late 2016/early 2017. The Board was tasked with making a decision in this case based on the record before it. The Company's persistent refusal to recognize or bargain with the duly certified Union

which issued on November 10, 2016 (Add. 14), the Company still had employed local musicians within the preceding 2 years outlined by *Juilliard School* for the productions of *Annie* (November 5-16, 2014) and *White Christmas* (December 16-28, 2014). (A. 180, 182-87.) “In essence,” the Board determined (Add. 14 n.1), by making the foregoing argument the Company is “asserting that the Union’s certification . . . should not be honored during the certification year.”<sup>21</sup> However, the Board found (Add. 14 n.1) that the Company had failed to demonstrate “any ‘unusual circumstances’” such that its obligation to bargain is relieved. That finding is consistent with established Board law where “during the initial year of certification, the Board has uniformly held that employee turnover does not constitute ‘unusual circumstances’ relieving an employer of its obligation to bargain.” *King Elec. Inc.*, 343 NLRB No. 54, 2004 WL 2461360, at \*1 n.1 (Oct. 29, 2004) (citing cases), *enforcement denied on other grounds*, 440 F.3d 471, 474 (D.C. Cir. 2006).

The Company’s cited cases (Br. 32) are factually inapposite and, consequently, the Board did not depart “from its precedent without explanation” in 

---

has postponed bargaining into the future that it previously speculated about, and it should not enjoy the fruits of such an unfair labor practice.

<sup>21</sup> Once a duty to bargain is imposed on an employer as a result of Board certification of a union, challenges to the union’s majority status are barred for one year after the certification, known as the “certification year.” *Lamons Gasket Co.*, 357 NLRB 739, 744 (2011) (citing 29 U.S.C. § 159(c)(3); *Ray Brooks v. NLRB*, 348 U.S. 96 (1954).)

rejecting the Company's contention that its duty to bargain is excused because there are no employees in the unit. In one case, the employer closed its plant and permanently laid-off all unit employees. *Rice Growers Ass'n of Cal., Inc.*, 312 NLRB 837, 839 (1993). In other two cases, changes to the units' size resulted in permanent single-employee units, which an employer need not recognize or bargain with under Board law. *Kirkpatrick Elec. Co.*, 314 NLRB 1047, 1047 n.3 (1994) (bargaining unit had permanent complement of only one employee); *Westinghouse Elec. Corp.*, 179 NLRB 289, 289 (1969) (one employee in two-member unit voluntarily terminated employment and employer neither needed nor intended to replace him).

The Board also reasonably rejected the Company's claim (Br. 33-34) that it has no duty to bargain, and thus committed no unfair labor practice, because the Union has not sought bargaining over employment terms that it controls. As the Board found (Add. 14), the Company admitted in its answer to the complaint that the Union requested recognition and bargaining and that "it has neither bargained with nor recognized the Union at any relevant time." (A. 394 ¶¶ 9-10, 398 ¶¶ 9-10.) Having conceded that, the Company should not now be heard to argue (Br. 34) that the Union never properly requested bargaining. The Company also faults (Br. 34) the Union for having "never identified anything" to bargain over. In response to the Union's request for bargaining, the Company asked that the Union

provide a list of issues that it wanted to negotiate over. The Union's silence and instead filing an unfair-labor-practice charge are understandable, given that the Company closed its reply with the admonition that although it was willing to meet and discuss the issues, "such a meeting would not be bargaining." (A. 390.)

Finally, as discussed (pp. 26-27), there is no merit to its contention that there is nothing for the parties to bargain over because the producers assertedly control the musicians' employment terms, a contention contradicted by the prior bargaining agreement and the Board's finding that the Company, not the producers, is the musicians' employer. As explained above (pp. 17-29), the Board properly rejected that argument in the representation case.

## CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

/s/ Usha Dheenan

USHA DHEENAN

*Supervisory Attorney*

/s/ Jared D. Cantor

JARED D. CANTOR

*Attorney*

National Labor Relations Board

1015 Half Street, SE

Washington, DC 20570

(202) 273-2948

(202) 273-0016

PETER B. ROBB

*General Counsel*

JENNIFER A. ABRUZZO

*Deputy General Counsel*

JOHN H. FERGUSON

*Associate General Counsel*

LINDA DREEBEN

*Deputy Associate General Counsel*

National Labor Relations Board

December 2017

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

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	
	)	
and	)	
	)	
BOSTON MUSICIANS' ASSOCIATION, LOCAL 9-535	)	No. 17-1650
	)	
Interested Party - Intervenor	)	Board Case No
	)	1-CA-179293
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 9, 547 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 11th day of December, 2017

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

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	
	)	
and	)	
	)	
BOSTON MUSICIANS' ASSOCIATION, LOCAL 9-535	)	No. 17-1650
	)	
Interested Party - Intervenor	)	
	)	BoardCase No.
v.	)	1-CA-179293
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on December 11, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

Gabriel O. Dumont, Jr.  
Dumont Morris & Burke PC  
141 Tremont St, 5th Flr  
Boston, MA 02111

Arthur Gershon Telegen  
Seyfarth Shaw LLP  
2 Seaport Ln, Ste 300  
Boston, MA 02210-1800

/s/Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
Washington, DC 20570

Dated at Washington, DC  
this 11th day of December, 2017