

Final Brief

Oral Argument Not Yet Scheduled

No. 20-1010

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

LOCAL 23, AMERICAN FEDERATION OF MUSICIANS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review of a Decision and Order of
the National Labor Relations Board

**BRIEF OF PETITIONER LOCAL 23,
AMERICAN FEDERATION OF MUSICIANS**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. Local 23, American Federation of Musicians was the Charging Party in the proceedings before the National Labor Relations Board (NLRB) and is the Petitioner in this Court. For purposes of the disclosure statement required by Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Local 23 is a labor union chartered by the State of Texas as a nonprofit organization. Local 23 has no parent companies and no publicly-held company has a 10% or greater ownership interest in Local 23.

The NLRB is the Respondent in this Court. Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts was the Respondent in the proceedings before the NLRB but is not a party in this Court. There were no amici in the proceedings before the NLRB and there are no amici in this Court.

B. Rulings Under Review. The NLRB's Decision and Order in *Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts* and *Local 23, American Federation of Musicians*, Case 16-CA-193636, was published on August 23, 2019, and reported at 368 NLRB No. 46. The NLRB's unpublished Order Denying

Motion for Reconsideration, Case 16-CA-193636, was issued on December 11, 2019.

C. Related Cases. This case has not previously been before this Court or any other court. Counsel for Petitioner is not aware of any related case currently pending in this Court or any other court.

/s/ Matthew J. Ginsburg
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MISCELLANEOUS

Boston Symphony Orchestra: 2019-20 Season Brochure, available at http://bso.http.internapcdn.net/bso/images/uploads/brochures/BSO19-20_Brochure.pdf (last checked May 1, 2020) 40

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GLOSSARY

“ALJ”.....Administrative Law Judge

“CBA”.....Collective Bargaining Agreement

“Musicians’ Union”.....Local 23, American Federation of Musicians

“NLRA” or “the Act”.....National Labor Relations Act

“NLRB” or “the Board”.....National Labor Relations Board

“Tobin Center”.....Tobin Center for the Performing Arts

**BRIEF OF PETITIONER LOCAL 23,
AMERICAN FEDERATION OF MUSICIANS**

STATEMENT OF JURISDICTION

The basis for this Court’s jurisdiction over this case is National Labor Relations Act § 10(f), which states, in relevant part, that “[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside.” 29 U.S.C. § 160(f).

Petitioner Local 23, American Federation of Musicians (the Musicians’ Union) is a “person aggrieved” within the meaning of § 10(f) because the Union was the Charging Party in the proceedings before the National Labor Relations Board in which the Board dismissed in its entirety the complaint brought by the NLRB General Counsel on the Union’s behalf, thus “denying in whole . . . the relief sought” by the Union.

The Board issued its Decision and Order, which constitutes “a final order” for purposes of § 10(f), on August 23, 2019. The Board further issued an Order Denying Motion for Reconsideration on

December 11, 2019. The Musicians' Union filed this petition for review on January 16, 2020, which is timely as the National Labor Relations Act provides no time limitation for the filing of a petition for review.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the new standard the NLRB announced in this case for determining whether employees of a contractor or licensee may access the property where they work to engage in Section 7 activity when that property is owned by an entity other than their own employer is contrary to the Supreme Court's and this Court's precedent and thus constituted an abuse of discretion.

2. Whether the NLRB's application of its new standard to the facts of this case to determine that the musicians who are members of Local 23, American Federation of Musicians did not have a sufficient connection to the Tobin Center for the Performing Arts as their workplace to be entitled to exercise their Section 7 rights at the Center was arbitrary.

STATUTES AND REGULATIONS

Section 7 of the National Labor Relations Act states as follows:

“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.” 29 U.S.C. § 157.

Section 8(a)(1) of the National Labor Relations Act states as follows:

“It shall be an unfair labor practice for an employer--
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;” 29 U.S.C. § 158(a)(1).

STATEMENT OF THE CASE

I. FACTS

A. Local 23, American Federation of Musicians (the “Musicians’ Union”) represents the musicians employed by the San Antonio

Symphony, as well as by other performing arts organizations in San Antonio. D&O 25 & n.3 [JA31].¹ The Symphony is one of three principal resident companies at the Tobin Center for the Performing Arts (the “Tobin Center”), the premier performing arts venue in San Antonio, Texas. *Id.* at 25 [JA31].

The terms of the Symphony musicians’ employment are set forth in a collective bargaining agreement (CBA) between the Symphony and the Musicians’ Union. *See* GC Ex. 7 [JA221-94] (2015-17 collective bargaining agreement). The CBA provides the musicians with thirty guaranteed paid weeks, which is the period defined as the Symphony’s annual season. *Id.* (CBA Art. VI A. [JA229-30]). That season, in turn, takes place within a 39-week window each year between September to June, with a break for the summer. *Ibid.*; D&O 25 [JA31]. The CBA includes detailed rules regarding how many “services” – defined to

¹ Citations to “D&O” refer to the NLRB’s Decision and Order in *Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts*, 368 NLRB No. 46 (Aug. 23, 2019). Citations to “Or.” refer to the NLRB’s unpublished Order Denying Motion for Reconsideration, Case No. 16-CA-193636 (Dec. 11, 2019). Citations to “GC Ex.” refer to the NLRB General Counsel’s exhibits at the hearing in this case. Citations to “Tr.” refer to the transcript of the hearing in this case. Citations to “MFR Br.” refer to Charging Party’s Brief in Support of Motion for Reconsideration.

include performances, rehearsals, and electronic media activity – may take place in a given workweek. GC 7 (CBA Art. II F. [JA225], defining a “service”); (CBA Art. XIII E. [JA247], stating that “a basic work-week will have a maximum of seven (7) services,” as well as exceptions to that rule). Regardless of how much they work during any particular week, the CBA provides that “Musicians shall be paid on Friday every two weeks” in “21 pay periods from September 1 through June 30,” with “[t]he total annual salary . . . divided equally between these pay periods.” GC Ex. 7 (CBA Art. VI I. [JA233]).

The CBA requires the Symphony to employ a “minimum Orchestra complement” of 72 musicians (including one librarian) allocated by instrument, *e.g.* 23 violins, 7 cellos, 6 basses, 3 flutes, 1 tuba. GC Ex. 7 (CBA Art. V [JA229]). Musicians are initially hired on a season-by-season basis using a form contract that is part of the collective bargaining agreement. GC Ex. 7 (CBA Art. XII [JA243] & App. A [JA286]). However, after three consecutive seasons of employment, musicians receive tenure. GC Ex. 7 (CBA Art. II B. [JA225]). In addition to tenure, seniority pay and other benefits are determined by the number of seasons a musician has been employed by

the Symphony. *See, e.g.*, GC Ex. 7 (CBA Art. VI D. [JA231], Seniority Pay); (CBA Art. VI G. [JA232], Severance Pay); (CBA Art. XI E. [JA241], Sabbatical Leave for Season).

Beyond its own annual performance schedule, the Symphony also regularly provides music for the other two principal resident companies at the Tobin Center – the Ballet San Antonio and Opera San Antonio. D&O 3, 25 [JA9, 31]. For example, the Symphony provides live music for the Ballet’s annual holiday production of *The Nutcracker*. *Id.* at 25 [JA31]. Musicians are generally paid according to the CBA for the Symphony’s performances in connection with a Ballet or Opera production, although these performances do not count towards the minimum number of paid weeks guaranteed by the CBA. GC Ex. 7 (CBA Art. VI J. [JA233])

Although most of the musicians’ performances for the Ballet and Opera are covered by the CBA with the Symphony, at the Opera’s request, the Musicians’ Union entered into a separate collective bargaining agreement with the Opera. D&O 25 n.3 [JA31]. By entering into this separate CBA, the Opera was able to present Verdi’s *Macbeth* using a smaller number of musicians than the full Symphony –

58 musicians rather than the full 72-musician complement required by the Symphony CBA – thus realizing a significant cost savings. Tr. 230-34 [JA126-30].

B. Each principal resident company enters into a “Use Agreement” with the Tobin Center setting forth the terms of the relationship, including when each company will have use of the Center’s three main performance venues. D&O 3 [JA9]. *See, e.g.*, GC Ex. 4 [JA199-217] (Symphony Use Agreement for 2015-16, 2016-17, and 2017-18 seasons) & Addendum C [JA205] (Symphony Schedule of Events for 2015-16 season).

The Symphony’s Use Agreement entitles it to use the Tobin Center for its own performances and rehearsals for 22 weeks during the Symphony’s annual season, in addition to whatever performances the Symphony may undertake in connection with Ballet and Opera productions. D&O 25 [JA31]. *See also* GC Ex. 16 [JA394-480] (Symphony’s detailed schedule for 2016-17 season, including performances and rehearsals for Ballet and Opera). A typical week would include three days of rehearsals, including some dates with both morning and evening rehearsals, at the Tobin Center on Tuesday

through Thursday, followed by three days of performances at the Center on Friday through Sunday. *See, e.g.*, GC 16 at “Week 1” [JA394] (showing 5 rehearsals and 3 performances at Tobin Center during week of September 12, 2016). Throughout the period in which the Symphony’s annual season takes place – *i.e.*, the entire year except for the summer months – the Symphony maintains a library at the Tobin Center that is staffed by a Musicians’ Union bargaining unit member, some musicians store their instruments at the Tobin Center, and the Musicians’ Union uses the Tobin Center breakroom for its bimonthly union meetings. D&O 3, 25 [JA9, 31].

Each year, the Symphony conducts a few of its performances at locations other than the Tobin Center. D&O 3 [JA9]. For example, the Symphony might rehearse and perform music at the Tobin Center on several dates during a week and also perform that same music at a community location, such as a high school. *See, e.g.*, GC 16 at “Week 2” [JA397] (showing performances at the Tobin Center and one performance of same music at Southwest High School). However, over the course of a season, approximately 80 percent of the Symphony’s

performances and rehearsals take place at the Tobin Center. D&O 3 [JA9].²

C. In the fall of 2016, representatives of the Musicians' Union held a meeting with both the Opera and Symphony management and then, the next week, with both the Ballet and Symphony management, to discuss financial and scheduling issues that, as the Musicians' Union later explained to San Antonio elected officials, "have impeded the Symphony's ability to offer a full 39-week season to the community and to its musicians." GC Ex. 20 [JA482-83]. The Ballet's plan to use recorded music for some of its productions, in particular, constituted "a blow to the Musicians who already volunteered to accept up to three

² Both the Administrative Law Judge and the Board considered only the performances and rehearsals *the Symphony* undertook at the Tobin Center, rather than calculating the figure from the vantage point of Musicians' Union members. *See* D&O 3, 25 [JA9, 31]. As a result, neither figure includes the musicians' direct employment by the Opera subject to the separate CBA between the Opera and the Musicians' Union.

In addition, during several weeks of the 2016-17 Symphony season, the Symphony functioned with a "split orchestra," meaning that during some weeks one ensemble performed at the Tobin Center while another performed at a community location. *See, e.g.*, GC Ex. 16 at "Week 9" [JA414] (one Symphony ensemble performed *The Nutcracker* at the Tobin Center with the Ballet, while another ensemble performed the *Messiah* at several community churches).

furloughed weeks of Symphony work this season, the equivalent of a 10% or more reduction in their already substandard wages.” *Ibid.* For this reason, the Union explained, “it is artistically and institutionally imperative for the Ballet, the Tobin Center, and all community partners and stakeholders to find a pathway to complement the sacrifices and discounts offered by the Musicians and the Symphony in order to provide live orchestral music for all Ballet San Antonio productions.”

Ibid.

The Ballet nevertheless proceeded with its plan to use recorded music at its upcoming performance of Tchaikovsky’s *Sleeping Beauty* at the Tobin Center. D&O 3 [JA9]. When that performance opened, in February 2017, members of the Musicians’ Union sought to raise awareness of the Ballet’s decision not to employ musicians for the production by handing out leaflets on the sidewalk immediately in front of the Tobin Center’s main entrance to patrons attending the premier.

Ibid.

Those leaflets, which addressed Ballet patrons and identified the leafleters as members of the Musicians’ Union, stated that:

“You will not hear a live orchestra performing with the professional dancers of Ballet San Antonio. Instead, Ballet San Antonio will waste the world class acoustics of the Tobin Center by playing a recording of Tchaikovsky’s score over loudspeakers. You’ve paid full price for half of the product. San Antonio deserves better! DEMAND LIVE MUSIC!” D&O 3-4 [JA9-10] (reproducing text from GC Ex. 9 [JA296]).

The Musicians’ Union members were immediately met by Tobin Center management who told them that they could not distribute the leaflets anywhere on the Center’s property, including the sidewalk in front of the main entrance. D&O 4 [JA10]. As a result, the musicians were forced to attempt to distribute their leaflets to Ballet patrons – who access the Tobin Center from multiple directions and, in some cases, valet park their vehicles without ever setting foot on public property – from the opposite side of an active street away from the Tobin Center entrance. *Ibid.*; Tr. 178-79, 187 [JA113-14, 117].

II. PROCEDURAL HISTORY

The Musicians’ Union filed an unfair labor practice charge with the National Labor Relations Board (NLRB), alleging that the Tobin

Center violated Section 8(a)(1) of the National Labor Relations Act (NLRA) by prohibiting the musicians from distributing leaflets to Ballet patrons on the sidewalk in front of the Tobin Center's main entrance. D&O 24 [JA30]. After the NLRB's General Counsel brought a complaint, an administrative law judge (ALJ) found a violation, concluding that "it is clear that symphony musicians worked regularly at the Tobin Center," that the musicians' actions were protected by the Act since "[t]heir objective was solely to increase their employment opportunities in conjunction with the performances of the Ballet," and that, "[g]iven the broad expanse of the sidewalk in front of the Tobin Center and [the] limited number of leafleters, there is no evidence that these individuals did, or would have, impeded access to the Tobin Center." *Id.* at 26 [JA32]. The ALJ thus issued a recommended order that the Tobin Center cease and desist from "[p]rohibiting and/or preventing off-duty employees who are regularly employed at the Tobin Center, including employees of the San Antonio Symphony, from engaging in handbilling in nonworking areas of the Tobin Center property when that handbilling relates to wages, hours or other terms

and conditions of employment,” and to post a notice to that effect. *Id.* at 27-28 [JA33-34].

The Board reversed the ALJ’s decision and dismissed the complaint. D&O 1 [JA7].

First, the Board announced that it was overruling its decisions in *New York New York Hotel and Casino*, 356 NLRB 907 (2011), *enfd.* 676 F.3d 193 (D.C. Cir. 2012), *cert. denied* 133 S.Ct. 1580 (2013), and *Simon DeBartolo Group*, 357 NLRB 1887 (2011), and announced a new property access rule applicable to contractor employees and “off-duty employees of a licensee employer who are neither employees of the property owner nor, like nonemployees, utter strangers to the owner’s property.” D&O 1-2 [JA7-8]. The Board’s newly-announced rule was as follows:

“[A] property owner may exclude from its property off-duty contractor employees seeking access to the property to engage in Section 7 activity unless (i) those employees work both regularly and exclusively on the property and (ii) the property owner fails to show that they have one or more reasonable nontrespassory

alternative means to communicate their message.” *Id.* at 2-3 [JA8-9].

Applying that new rule to the facts of this case, the Board held that “the Symphony employees did not ‘regularly’ work on the [Tobin Center]’s property because the Symphony itself did not regularly conduct business or perform services there.” D&O 10 [JA16]. The Board reached this conclusion in several steps: first noting that the Symphony “was entitled to use the [Tobin Center]’s property for only 22 weeks of the year”; on that basis deducing that, “[f]or well over half the year, the Symphony is not present on the [Tobin Center]’s property”; and then concluding that “[t]hus, there is no basis to find that the Symphony employees worked regularly on the [Tobin Center]’s property.” *Id.* at 10-11 [JA16-17].

In addition, the Board held that “the Symphony employees did not work on the [Tobin Center]’s property exclusively” because “[t]hey also performed at the Majestic Theater and other venues throughout San Antonio, such as churches and high schools,” and because “[d]uring the 2016-2017 performance season, only 79 percent of the Symphony

employees' performances and rehearsals were held on the [Tobin Center]'s property." D&O 10 [JA16].

Finally, the Board held that, "even assuming arguendo" "that the Symphony employees did . . . work regularly and exclusively on the [Tobin Center]'s property," it was not an unfair labor practice for the Tobin Center to prohibit the musicians from distributing leaflets to Ballet patrons on the sidewalk in front of the Center's main entrance because "it is clear that they had other alternative nontrespassory channels of communication to reach the general public," including that they were "able to leaflet on a public sidewalk across the street from the [Tobin Center]'s property." D&O 11 [JA17]. The Board also noted that "the Symphony employees also had other channels they could have used to convey their message, including newspapers, radio, television, and social media, such as Facebook, Twitter, YouTube, blogs, and websites."

Ibid.

The Musicians' Union filed a motion for reconsideration, pointing out that the NLRB's dual conclusions that the musicians are not regularly and exclusively employed at the Tobin Center and that, even if they were, the Center was within its rights to treat the musicians in

the same manner as nonemployees for purposes of property access, are “inconsistent with basic principles of labor law.” MFR Br. 2. The Musicians’ Union explained that, because “[t]he Tobin Center is . . . the musicians’ home base and principal workplace,” it is “the only location where it makes sense for them to exercise their *Republic Aviation* rights.” *Ibid.* See also *id.* at 19 (“Under any reasonable understanding of the Board’s traditional ‘regular and exclusive’ employment requirement, . . . the musicians must be permitted to exercise their Section 7 rights at the Tobin Center.”). And, the Union pointed out that the Board’s application of a “no alternative means of communication” test to even employees who work regularly and exclusively on a property owner’s property is contrary to Supreme Court precedent, specifically that “the Board may not categorically privilege property interests when a property owner seeks to exclude employees who work on the property from exercising their Section 7 rights, but rather must reach an ‘[a]lcomodation between the two.’” *Id.* at 17 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).

In denying the Musicians’ Union’s motion for reconsideration, the Board rejected these arguments in a footnote, stating only that “[w]e

find no merit in the Charging Party’s contention” “that the new access standard for off-duty employees of an onsite contractor announced in the Board’s Decision and Order is ‘legally infirm’ because it would bar many off-duty contractor employees from exercising their rights under *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)” because “the D.C. Circuit recognized that the Supreme Court has never decided whether contractor employees have *Republic Aviation* rights to engage in organizational activities in nonwork areas during nonwork time.” Or. 1 n.2 [JA35] (citing *New York-New York, LLC v. NLRB*, 676 F.3d 193, 196 (D.C. Cir. 2012) (quoting *New York New York, LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002)), cert. denied 133 S.Ct. 1580 (2013)).

The Musicians’ Union then filed this petition for review.

SUMMARY OF ARGUMENT

The issue that the NLRB addresses in this case – the right of employees to engage in Section 7 activity at their workplace when that workplace is located on property owned by an entity other than their own employer – is a familiar one for this Court. In the *New York New York* litigation, this Court twice considered Board decisions concerning the Section 7 rights of a group of contractor employees whose workplace

was located on property owned by another employer. *New York New York, LLC v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002) (*New York New York I*); *New York-New York, LLC v. NLRB*, 676 F.3d 193 (D.C. Cir. 2012) (*New York New York II*). Through that process, the Court established the precise limits within which the Board may exercise its discretion when determining the Section 7 rights of contractor or similar employees.

The key to this Court's guidance is that, in each case, the NLRB must balance the NLRA-protected interest of employees to exercise their Section 7 rights at the principal location where they work with any specific interests of the property owner relating to the use of the property. The result is that the right of any particular group of contractor employees to exercise their Section 7 rights at work may be more limited than the equivalent right of employees who work on their own employer's property, and the right of a property owner to limit Section 7 activity by a contractor's employees may be more robust than the equivalent right of a direct employer vis-à-vis its own employees. Nevertheless, in any given factual setting, the proper accommodation between Section 7 rights and property rights must fall at a point on the

spectrum between the full employee access rights guaranteed by *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), and its progeny, and the very limited access rights permitted nonemployees by *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

In this case, the NLRB announced a test for determining the Section 7 rights of contractor employees that fails to heed this Court's guidance. The Board held that "a property owner may exclude from its property off-duty contractor employees seeking access to the property to engage in Section 7 activity unless (i) those employees work both regularly and exclusively on the property and (ii) the property owner fails to show that they have one or more reasonable nontrespassory alternative means to communicate their message." D&O 2-3 [JA8-9]. As applied by the Board in this case, there are two separate and independent respects in which that test exceeds the limits of the Board's discretion.

First, in determining whether contractor employees have a sufficient connection to the owner's property as their workplace so as to even *potentially* have the right to engage in Section 7 activity at that

location, the NLRB applied the “work both regularly and exclusively on the property” portion of its test so strictly as to fail to give appropriate weight to the NLRA-protected interest of contractor employees to exercise their Section 7 rights at the principal location where they work.

The NLRB’s application of the “work regularly” inquiry to the facts of this case illustrates the Board’s error. There can be no serious question that the musicians work regularly and, more generally, maintain a regular presence, on the Tobin Center property throughout the ten-month period when the Symphony’s annual season takes place. Yet, because the musicians worked on the property on less than a year-round basis, the Board concluded that the Tobin Center could prohibit them from exercising their Section 7 rights at the Center altogether, even during the part of the year when they worked regularly on the Center’s property.

That interpretation of what it means to “work regularly on the property” is both contrary to the Board’s precedent and lacks any reasoned basis. The Board has previously held that contractor employees who are employed on a part-time or even short-term basis on the property owner’s property may still be viewed as “working regularly

on the property” in relation to whatever time period their employer is engaged on the property. Yet, the Board departed from that precedent here without either acknowledging it was doing so or providing any explanation for why the Section 7 rights of contractor employees who are employed on less than a full-time, year-round basis are entitled to no weight at all in the required balancing.

The Board took a similar approach, and made similar errors, in announcing a strict definition of what it means to “work exclusively on the property” – that employees must perform all of their work for the contractor on the property – and then applying that standard in this case. It is undisputed that, although the Symphony occasionally performs at community locations outside the Tobin Center, the substantial majority of the musicians’ work takes place at the Center itself. Crucially, none of the other locations where the Symphony performs constitutes an appropriate alternative location for the musicians to exercise their workplace Section 7 rights. Nevertheless, applying its new definition of what it means to “work exclusively on the property,” the Board concluded that solely because the musicians occasionally worked offsite for the Symphony, the Tobin Center was

permitted to prohibit them from engaging in Section 7 activity at the Center altogether.

That interpretation of what it means to “work exclusively on the property” is both contrary to the Board’s precedent and lacks any reasoned basis. In precedent that the Board embraces, the Board previously treated the “work exclusively on the property” requirement as a practical inquiry concerned with whether contractor employees have a home base or other alternative location away from the property owner’s property where they can exercise their Section 7 rights. The Board does not acknowledge that its new definition is contrary to this precedent, nor does it provide any explanation for its rule that regularly-employed contractor employees who work even one time for their employer at another location can be stripped of their Section 7 rights altogether at their principal workplace without any balancing of interests.

Second, the NLRB’s further new requirement that, even if contractor employees can meet the strict test of “working both regularly and exclusively on the property,” the property owner can still prohibit them from exercising their Section 7 rights if the employees have any

“reasonable nontrespassory alternative means to communicate their message,” constitutes a separate and independent legal error. The NLRB makes no secret that it adopted this standard from the Supreme Court’s *Babcock & Wilcox* and *Lechmere* decisions, which concerned the Section 7 rights of nonemployees, and the Board stated bluntly that the musicians “have *no rights* greater than those of other nonemployee strangers under *Lechmere* and *Babcock & Wilcox* to access [the Tobin Center] property.” D&O 12 [JA18] (emphasis added).

By treating the musicians’ Section 7 rights as equivalent to those of nonemployees, rather than locating the musicians’ rights at a point on the spectrum between the full employee access rights guaranteed by *Republic Aviation*, and the very limited rights permitted nonemployees by *Babcock & Wilcox* and *Lechmere*, the NLRB disregarded this Court’s requirement that it balance the NLRA-protected interest of the musicians to exercise their organizational rights at the principal location where they work with any property-specific interests of the Tobin Center. In doing so, the Board completely disregarded the musicians’ strong nonderivative Section 7 interest in communicating directly with patrons of the Ballet as they entered the Tobin Center –

the location that was both the musicians' principal work site and, as such, the locus of the dispute with the Ballet that was the subject of the musicians' NLRA-protected message to patrons regarding the Ballet's use of live music.

STANDING

The Musicians' Union has standing to bring this petition for review because it is a "person aggrieved by a final order of the Board . . . denying in whole . . . the relief sought" before the Board. NLRA § 10(f), 29 U.S.C. § 160(f). The Musicians' Union was the Charging Party in the proceedings before the NLRB in which the Board dismissed in its entirety the complaint brought by the NLRB General Counsel on the Union's behalf.

ARGUMENT

The NLRB's new test for determining the right of contractor employees to engage in Section 7 activity at their workplace when that workplace is located on property owned by an entity other than their own employer constitutes an abuse of discretion because it fails to give appropriate weight to employees' strong interest in engaging in Section 7 activity at their principal workplace in the balancing of employee and

property interests required by this Court. *See ITT Indus. Inc. v. NLRB*, 251 F.3d 995, 1004 (D.C. Cir. 2001) (“In determining whether an agency’s interpretation represents a reasonable accommodation of conflicting statutory purposes, a reviewing court must determine both whether the interpretation is arguably consistent with the underlying statutory scheme in a substantive sense and whether the agency considered the matter in a detailed and reasoned fashion.”) (quoting *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 151 (D.C.Cir.1984)).

The NLRB also arbitrarily applied its new test to the facts of this case. The Board’s conclusion that the musicians did not have a sufficient connection to the Tobin Center property to meet the Board’s “work both regularly and exclusively on the property” standard is simply contrary to the undisputed facts of this case. *See DHL Express, Inc. v. NLRB*, 813 F.3d 365, 371 (D.C. Cir. 2016) (stating that the Court will not enforce a decision “if the Board’s factual findings are not supported by substantial evidence, or the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case”) (quoting *Pirlott v. NLRB*, 522 F.3d 423, 432 (D.C. Cir. 2008)).

I. IN DETERMINING THE ACCESS RIGHTS OF EMPLOYEES OF A CONTRACTOR OR LICENSEE, THE BOARD MUST GIVE APPROPRIATE WEIGHT TO EMPLOYEES' SECTION 7 INTERESTS IN THE REQUIRED BALANCING WITH THE PROPERTY OWNER'S RIGHTS

Section 7 of the National Labor Relations Act provides that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. Section 8(a)(1) states that “[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees” in the exercise of those rights. *Id.*, § 158(a)(1).³

The Board has long held, with judicial approval, that the workplace is the “place uniquely appropriate” for employees to exercise their Section 7 rights. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793,

³ Section 2(3) of the NLRA states that “[t]he term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer.” 29 U.S.C. § 152(3). The Supreme Court has explained that this means that “a statutory ‘employer,’” such as a property owner, “may violate § 8(a)(1) with respect to employees other than his own.” *Hudgens v. NLRB*, 424 U.S. 507, 509-10 & n.3 (1976). The ALJ found, and it was undisputed before the Board, that the Tobin Center is an employer for purposes of the NLRA. D&O 25 [JA31].

801 n.6 (1945) (quoting *Republic Aviation Corp.*, 51 NLRB 1186, 1195 (1943)). That is because the workplace is “the one place where employees clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (quoting *Gale Products*, 142 NLRB 1246, 1249 (1963)). For that reason, “[n]o restriction may be placed on the employees’ right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline.” *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956) (citing *Republic Aviation*, 324 U.S. at 803). *See also DHL Express*, 813 F.3d at 374 (“[T]he employer’s ability to restrict pro-union activity by an off-duty employee legally on the premises – in a non-work area – is quite limited.”).

When employees seek to exercise their Section 7 rights at a work site owned by an entity other than their own employer, however, the analysis falls in “the gap” between “two lines of judicial opinions” – *Republic Aviation* and its treatment of the Section 7 rights of employees

at their own employer's facility, and *Babcock & Wilcox* and its treatment of the access rights of nonemployees. *ITT Indus., Inc. v. NLRB*, 413 F.3d 64, 68 (D.C. Cir. 2005). In this circumstance, "it is 'the task of the Board . . . to resolve conflicts between § 7 rights and private property rights, and to seek a proper accommodation between the two.'" *Id.* at 72 (quoting *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976)).

In its original 2001 decision in *New York New York Hotel & Casino*, 334 NLRB 762, 762 (2001), the NLRB addressed the right of off-duty employees of a contractor, Ark Las Vegas Restaurant Corporation ("Ark"), that operated restaurants within a casino operated by the property owner, New York New York Hotel and Casino ("New York New York" or "NYNY"), to "st[and] on the sidewalk and attempt[] to distribute handbills to customers as they entered the facility." The Board analyzed that decision as follows:

"[T]he Board has held that employees of a subcontractor of a property owner who work regularly and exclusively on the owner's property are rightfully on that property pursuant to the employment relationship, even when off duty. *Gayfers Department Store*, 324 NLRB 1246, 1249-1250 (1997),

citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Southern Services*, 300 NLRB 1154, 1155 (1990), *enfd.* 954 F.2d 700 (11th Cir. 1992). By contrast, individuals who do not work regularly and exclusively on the employer's property, such as nonemployee union organizers, may be treated as trespassers, and are entitled to access to the premises only if they have no reasonable non-trespassory means to communicate their message. *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). A clear distinction exists between the Ark employees, who work regularly and exclusively in the Respondent's facility, and taxi and limousine drivers and other delivery personnel who visit that facility intermittently in the course of their employment." *New York New York*, 334 NLRB at 762 (footnote omitted).

On review, this Court denied enforcement of the Board's decision. *New York New York, LLC v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002) (*New York New York I*). The Court explained that,

"The Supreme Court has never addressed the § 7 rights of employees of a contractor working on property under another

employer's control, and the Board's *New York New York* decisions shed little light on the important issues this factual pattern raises. The Board provided no rationale to explain why, in areas within the NYNY complex but outside of Ark's leasehold, Ark's employees should enjoy the same § 7 rights as NYNY's employees. Instead, the Board relied upon two of its previous decisions, *Southern Services*[], and [] *Gayfers Dep't Store*[],. While the Board is certainly entitled to invoke its precedents to justify a given result, the court's responsibility is to examine those precedents to make sure they supply the reasoning lacking in the Board's opinion under review. Here, neither *Southern* nor *Gayfers* fills the gap" *New York New York I*, 313 F.3d at 588 (internal citations omitted).

The Court thus remanded to the Board with specific instructions to "apply[] whatever principles it can derive from the Supreme Court's decisions" and to "consider the policy implications of any accommodation between the § 7 rights of Ark's employees and the rights of NYNY to control the use of its premises, and to manage its business and property." *New York New York I*, 313 F.3d at 591.

In its subsequent 2011 *New York New York* decision, the Board undertook the “accommodation between the Ark employees’ Section 7 interests and NYNY’s property rights and managerial interests” as follows:

“We conclude that the property owner may lawfully exclude such employees only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline (as those terms have come to be defined in the Board's case law). Thus, any justification for exclusion that would be available to an employer of the employees who sought to engage in Section 7 activity on the employer’s property would also potentially be available to the nonemployer property owner, as would any justification derived from the property owner’s interests in the efficient and productive use of the property.” *New York New York Hotel & Casino*, 356 NLRB 907, 918-19 (2011).

As the Board explained, this standard “leave[s] open the possibility that in some instances property owners will be able to

demonstrate that they have a legitimate interest in imposing reasonable, non-discriminatory, narrowly-tailored restrictions on the access of contractors' off-duty employees, greater than those lawfully imposed on its own employees." *New York New York*, 356 NLRB at 919. At the same time, the Board recognized that, where "employees of a contractor . . . are regularly employed on the property in work integral to the owner's business," "the employees are seeking to exercise their *own* statutory rights in and around their *own* workplace" and thus are "substantially different from the access seekers involved in cases applying some type of a reasonable-alternative-means standard – the union organizers in *Lechmere* and the offsite employees of a shopping center tenant in *Hudgens* – who had no connection to the property." *Id.* at 918-19 (emphasis added).⁴ The Board's test thus "place[d] the Ark employees and similarly situated, protected employees at a point on the spectrum of accommodation between Section 7 rights and property rights that reflects the similarities and differences between them and

⁴ On this basis, the Board majority rejected the dissent's suggestion that contractor employees' access should be denied if the property owner can show that the employees had "reasonable alternative means . . . of communicating with their intended audience." *New York New York*, 356 NLRB at 919 & n.51.

other access seekers considered in the Supreme Court's and [the Board's] prior jurisprudence, as well as the similarities and differences between NYNY and other property owners who wish to exclude the protected employees from their property." *Id.* at 919-20.

This Court affirmed, explaining that, "[o]n remand, the Board exercised its discretion within the limits this Court had set forth," "adequately consider[ing] and weigh[ing] the respective interests based on the principles from the Supreme Court's decisions and 'the policy implications of any accommodation between the § 7 rights of Ark's employees and the rights of NYNY to control the use of its premises, and to manage its business and property.'" *New York-New York LLC v. NLRB*, 676 F.3d 193, 196 & n.2 (D.C. Cir. 2012) ("*New York New York II*") (quoting *New York New York I*, 313 F.3d at 590).

Concurring, Judge Henderson added her "agree[ment] that the Board adequately considered the relevant factors and reasonably explained why, under Supreme Court precedent and in the specific context of this case, the Ark employees fall nearer along the 'spectrum' of section 7 access rights to New York New York's own employees than to the 'nonemployee union organizers' in [] *Babcock & Wilcox*[],

and *Lechmere*.” *New York New York II*, 676 F.3d at 197-98

(Henderson, J., concurring). In particular, Judge Henderson noted with approval the Board’s explanation that “the Ark employees should not ‘be considered the same as nonemployees when they distribute literature on NYNY’s premises outside of Ark’s leasehold’ because the Ark employees ‘were regularly employed on NYNY’s property’ and ‘the hotel and casino complex was their workplace.’” *Id.* at 198 (quoting *New York New York*, 356 NLRB at 914).

II. IN DETERMINING THAT THE MUSICIANS DID NOT HAVE A SUFFICIENT CONNECTION TO THE TOBIN CENTER TO EXERCISE THEIR SECTION 7 RIGHTS ON THE CENTER’S PROPERTY, THE BOARD FAILED TO GIVE APPROPRIATE WEIGHT TO THE MUSICIANS’ SECTION 7 INTERESTS IN THE BALANCING ANALYSIS REQUIRED BY THIS COURT

In this case, the NLRB overruled its 2011 *New York New York* decision, which, as we have explained, evaluated contractor employees’ access rights “on a case-by-case basis” to determine where they fall “on the spectrum of accommodation” by balancing both “Section 7 rights and property rights.” *New York New York*, 356 NLRB at 919. In its place, the Board adopted an approach that gives inordinate weight to the property owner’s right to exclude – to the detriment of employees’ organizational rights – by judging whether contractor employees “have

a sufficient connection” to the property based on a strict “work both regularly and exclusively on the property” test. D&O 2-3, 6 [JA8-9, 12].

The NLRB’s interpretation of what it means to “work both regularly and exclusively on the property” is contrary to the meaning given that phrase in the Board’s case law. And, the Board otherwise failed to provide a reasoned explanation for why contractor employees should be denied the right to exercise their Section 7 rights at their principal workplace merely because their employer works on the property on a less than year-round basis or because the contractor’s employees occasionally work for the contractor at another location. By failing to adequately account for the musicians’ strong Section 7 interest in exercising their organizational rights at the principal location where they work, the Board’s approach falls outside “the limits this Court ha[s] set forth” on “Board discretion over how to treat employees of onsite contractors for [access] purposes.” *New York New York II*, 676 F.3d at 196.

Because the NLRB applied its “work both regularly and exclusively on the property” test in two steps, dealing separately with

whether the musicians worked “regularly” and worked “exclusively” on the Tobin Center’s property, we address each step in turn.

A. The Board’s Application of Its “Work Regularly on the Property” Requirement

In its decision, the Board did not provide a detailed explanation of what it means for employees of a contractor or licensee to “work regularly on the property” at a particular location. Rather, the Board stated, in circular fashion, that “it is axiomatic that contractor employees can only work regularly on the property if the contractor they work for regularly conducts business or performs services there,” and then elaborated that, “[w]here a contractor conducts business or performs services only occasionally, sporadically, or on an ad hoc basis, it is simply impossible to find that the contractor’s employees work regularly on the property owner’s property.” D&O 8 [JA14].

In applying that “work regularly” standard to the facts of this case, however, the Board construed the requirement very strictly, explaining,

“[T]he Symphony employees did not ‘regularly’ work on the [Tobin Center]’s property because the Symphony itself did not regularly conduct business or perform services there. The Symphony’s

performance season lasted only 39 weeks of the year. The Symphony employees typically worked for 30 of those weeks – 27 weeks in the 2016-2017 performance season because of a furlough. And the Symphony itself, which would include the Symphony employees, was entitled to use the [Tobin Center]’s property for only 22 weeks of the year. For well over half the year, the Symphony is not present on the [Tobin Center]’s property. Thus, there is no basis to find that the Symphony employees worked regularly on the [Tobin Center]’s property.” D&O 10-11 [JA16-17].

Neither part of the NLRB’s conclusion – that “the Symphony . . . did not regularly conduct business or perform services” at the Tobin Center, and that “there is no basis to find that the Symphony employees worked regularly on the [Tobin Center]’s property,” D&O 9-10 [JA15-16] – bears any resemblance to the undisputed facts of this case. It was simply arbitrary for the Board to conclude on this record that the Symphony was only present on the Tobin Center property “occasionally, sporadically, or on an ad hoc basis,” such that “it is simply impossible to find that the [Symphony]’s employees work regularly on the [Tobin Center]’s property.” *Id.* at 8 [JA14].

First, the Symphony is a principal resident company of the Tobin Center and, pursuant to its multi-year Use Agreement with the Tobin Center, performs an annual season of concerts at the Center, in addition to using the Center for rehearsals and providing live music for productions by the Tobin Center's other principal resident companies, the Ballet and Opera. D&O 3 [JA9]. *See also id.* at 19 [JA25] (Member McFerran, dissenting) (explaining that the Symphony describes the Tobin Center as its "home" and that the Tobin Center prominently advertises the Symphony as its "resident"). It thus defies the ordinary meaning of the word to say that "the Symphony . . . did not regularly conduct business or perform services" at the Tobin Center. *Id.* at 10 [JA16].

Further, the fact, emphasized by the Board, that the Symphony's annual season runs for "*only* 39 weeks of the year" – *i.e.*, that the Symphony is only present on the Tobin Center property on a seasonal basis – does not provide a rational basis to conclude that "the Symphony . . . did not regularly conduct business or perform services" at the Tobin Center. D&O at 10 [JA16] (emphasis added).

Most importantly, that conclusion is contrary to how the Board has previously described what it means for contractor employees to “work regularly on the property.” In *Gayfers Department Store*, 324 NLRB 1246, 1250 & n.2 (1997), the Board rejected the property owner’s argument that the contractor employees in that case, electricians working on a short-term remodeling job at the Gayfers’ store, were distinguishable for NLRA purposes from the maintenance service contractor employees in *Southern Services, Inc.*, 300 NLRB 1154 (1990), who cleaned the property owner’s building on a year-round basis and who the Board had found worked regularly and exclusively on the premises. Dismissing Gayfers’ claim that “the three [contractor] electricians, unlike the employees in *Southern Services*, were ‘temporary’ and thus did not work ‘exclusively and regularly’ at the Gayfers’ store,” the Board explained that, “during the time period when [the contractor] was performing electrical work at the Gayfers jobsite, [the contractor]’s employees were effectively working exclusively and regularly at Gayfers.” *Gayfers*, 324 NLRB at 1250 n.2.

While the NLRB embraced *Gayfers* on this point, D&O 8 & n.59 [JA14], the Board did not provide any explanation for its contrary

conclusion in this case that the seasonal employment of a contractor should disqualify the contractor's employees from enjoying any access rights, a conclusion that is not at all self-evident. A rule that a recurring and consistent practice of leasing a property for ten months each year does not constitute "regular" use of the property is contrary to the dictionary definition of the term. *See Webster's Third New International Dictionary* (1981) (defining "regular" as "steady or uniform in course, practice, or occurrence"). A season that takes place during a September to June window, with a break for the summer, is also typical for many symphony orchestras, *see, e.g.*, Boston Symphony Orchestra: 2019-20 Season Brochure (showing season running from September 2019 through May 2020),⁵ as well as for many other employers in the performing arts, sports, and other seasonal industries. Most pertinently, the length of the lease was a contractually-negotiated term between the Tobin Center and the Symphony, presumably for the

⁵ Available at http://bso.http.internapcdn.net/bso/images/uploads/brochures/BSO19-20_Brochure.pdf (last checked May 1, 2020).

benefit of both parties, and it was during the term of this negotiated lease that the leafleting took place.⁶

Finally, the Board's finding that, "[f]or well over half the year, the Symphony is not present on the [Tobin Center]'s property," D&O 11

⁶ In a few places, the NLRB suggests that the Tobin Center was entitled to prohibit the musicians from leafleting "because the [Tobin Center] did not invite the Symphony or its employees onto its property at the time they sought to leaflet." D&O 13 n.86 [JA19]. *See also id.* at 11 [JA17] (noting that "the Symphony was not conducting business or performing services on the day when the Symphony employees sought to leaflet"); *id.* at 11-12 n.82 [JA17-18] ("we do not believe [access] rights should extend to leafleting at a facility where the contractor is not even present"). However, the Board does not rely on this rationale as a basis for its decision, and for good reason.

As the NLRB acknowledges, "[d]uring the performance season," the musicians had regular access to the Tobin Center, including to access the library and the break room and to store instruments. D&O 3 [JA9]. It is, therefore, simply not accurate to say that the Symphony was "not . . . present" at the Tobin Center on the day of the leafleting. *Id.* at 11-12 n.82 [JA17-18]. Relatedly, nothing in the record suggests that the Tobin Center was required to "invite the Symphony or its employees onto its property," *id.* at 13 n.86 [JA19], to rehearse or perform live music for a Ballet production, which was the musicians' specific demand. In fact, the evidence is to the contrary. At the hearing in this case, the Tobin Center's representative disclaimed any involvement in arrangements for live music between the Ballet or Opera and the Symphony, or between the Ballet or Opera and the Musicians' Union directly. Tr. 275-76 [JA146-47]. Finally, nothing in the logic of the Board's application of its "work both regularly and exclusively" standard suggests that the outcome of this case would have been different if, by chance, the musicians had been scheduled to perform or rehearse at the Tobin Center on the day the leafleting took place.

[JA17], represents a flat misrepresentation of the record. Specifically, the ALJ found, and the Board acknowledged, that,

“While the Symphony is leasing space from the Tobin Center (generally the entire year except for the summer months) symphony musicians use the Tobin Center breakroom for breaks and for union meetings. Some store their instruments (e.g. large instruments such as the Harp) at the Center. The Symphony also maintains a library at the Tobin Center staffed by a Local 23 bargaining unit member.” D&O 25 [JA31]. *See also id.* at 3 [JA9] (summarizing same).

Given the continuity of the musicians’ presence on the Tobin Center property throughout the Symphony season – including that the Symphony pays the musicians “on Friday every two weeks” in “21 pay periods from September 1 through June 30,” with “[t]he total annual salary . . . divided equally between these pay periods,” GC Ex. 7 (CBA Art. VI I. [JA233]) – the Board’s conclusion that “there is no basis to find that the Symphony employees worked regularly on the [Tobin Center]’s property,” D&O 11 [JA17], constituted an arbitrary application of Board’s “work regularly on the property” standard to the

facts of this case, one that completely disregarded the fact that the Tobin Center was the musicians' principal place of employment for ten months each year.

B. The Board's Application of Its "Work Exclusively on the Property" Requirement

The NLRB similarly disregarded the musicians' strong interest in engaging in Section 7 activity at their principal workplace in the manner in which the Board applied its "work exclusively on the property" standard to the facts of this case.

In describing the "work exclusively" standard, the Board set forth without citation or explanation a very strict test: "we will consider contractor employees to work 'exclusively' on the owner's property if they perform all of their work for that contractor on the property, even if they also work a second job elsewhere for another employer." D&O 3 [JA9]. Applying that standard, the Board held that "the Symphony employees did not work on the [Tobin Center]'s property exclusively" because the Symphony "also performed at the Majestic Theater and other venues throughout San Antonio, such as churches and high schools," and because "[d]uring the 2016-2017 performance season, only 79 percent of the Symphony employees' performances and rehearsals

were held on the [Tobin Center]’s property.” D&O 10 [JA16]. The Board made clear that, on this basis alone, the Tobin Center was entitled to prohibit the musicians from exercising their Section 7 rights on the Center’s property, even if they worked regularly there. *See id.* at 2-3 [JA8-9] (requiring that employees “work *both* regularly and exclusively on the property”). *See also id.* at 11 [JA17] (rejecting the dissent’s argument that “there is no basis for limiting Section 7 access rights only to employees who work exclusively on the property owner’s property”).

The NLRB’s definition of what it means to “work exclusively on the property” is both contrary to the Board precedent on which it relies and, as the Board’s application of its test to the facts of this case demonstrates, lacks any reasonable relationship to the Board’s stated purpose of determining whether contractor employees have a sufficient relationship to the property to treat the property as their workplace for purposes of determining their Section 7 rights.

The Board claimed to rely on its decision in *Postal Service*, 339 NLRB 1175 (2003), as well as Member Hayes’ dissent in *Simon DeBartolo Group*, 357 NLRB 1887 (2011), for its interpretation of what

it means for contractor employees to “work exclusively on the property.” *See* D&O 8 & nn. 59-64 [JA14] (discussing those cases in detail). *See also id.* at 8 [JA14] (stating “[w]e agree with the holding of the Board’s decisions prior to *New York New York*” with regard to the “exclusively work” standard). However, neither provides any support for the interpretation the Board adopted here.

Postal Service holds that “the ‘exclusivity’ language [in the Board’s 2001 *New York New York* decision, *Gayfers*, and *Southern Services*] clearly refers to the *locus* of the [employees’] workplace rather than to the customer for whom the contractor works.” 339 NLRB at 1177. As Member Hayes explained in *Simon DeBartolo*, “the extent of time [the contractor]’s employees spend at the [property owner]’s properties, as opposed to other facilities” is key to distinguishing between employees who truly have “some . . . regular presence” on the property and “persons who may have only a fleeting working relationship with the property owner’s site.” 357 NLRB at 1892 (Member Hayes, dissenting). *See also New York New York*, 334 NLRB at 762 (stating, in Board’s original 2001 decision, that “[a] clear distinction exists between the Ark employees, who work regularly and

exclusively in [NYNY]’s facility, and taxi and limousine drivers and other delivery personnel who visit that facility intermittently in the course of their employment”). Those explanations – that the purpose of the Board’s “work exclusively on the property” requirement is to weed out employees with only “a fleeting working relationship with the property owner’s site” or “who visit th[e] facility [only] intermittently in the course of their employment” – are strongly contrary to the Board’s explanation in this case that “we will consider contractor employees to work ‘exclusively’ on the owner’s property” only “if they perform *all* of their work for that contractor on the property.” D&O 3 [JA9] (emphasis added).

Postal Service also makes clear that a key aspect of the “work exclusively” inquiry is whether or not “employees have a work situs provided by their own employer.” 339 NLRB at 1178. *See also Simon DeBartolo*, 357 NLRB at 1892 (Member Hayes, dissenting) (describing the question as “whether there is a home base, owned by [the contractor], to which employees report, and at which they could engage in organizational activities without impinging upon the property rights of third parties”). As the Board acknowledged in this case, quoting

Postal Service, if employees have no such home base, then “there is no other place,” other than the property owner’s property, “at which they can exercise their Section 7 rights.” D&O 8 [JA14] (quoting 339 NLRB at 1178).

Yet, despite acknowledging *Postal Service’s* reasoning, the Board failed to apply its analysis in this case. Specifically, the Board completely ignored the fact that, while the Symphony did occasionally perform at a variety of locations other than the Tobin Center, there was no suggestion that any of these other locations – where the Symphony typically performed only once or, at most, a few times each season, *see* GC Ex. 16 [JA394-480] (detailed schedule for the Symphony’s 2016-17 season) – would constitute an appropriate work site for the musicians to exercise their Section 7 rights.

In many instances, the Symphony’s appearance at an offsite location was so fleeting that the Symphony performed its offsite presentation and then returned the next day to perform the same music at the Tobin Center. *See* GC Ex. 16, at “Week 2” [JA397] (Tuesday performance of *Scheherazade: A Symphonic Story* at Tobin Center, Wednesday performance at Southwest High School, Thursday

performance at Tobin Center, and additional rehearsal and performances of different music at Tobin Center on Thursday and on weekend). Yet, the Board provided no explanation for why this sort of industry-specific work schedule – perhaps unusual in other employment settings, but utterly typical for a symphony orchestra – should provide a basis to deny the musicians the right to exercise their Section 7 rights at the principal location where they work. *Cf. Nova Southeastern Univ. v. NLRB*, 807 F.3d 308, 314 (D.C. Cir. 2015) (“Although [the maintenance contractor] did not have a leasehold interest [on the property] like the contractor in *NYNY*, the handbilling occurred on campus as no other location . . . could be more appropriately understood as [the maintenance employees’] workplace.”).

In particular, the Board did not explain why it adopted as a categorical rule that “we will consider contractor employees to work ‘exclusively’ on the owner’s property . . . even if they also work a second job elsewhere for another employer,” D&O 3 [JA9], but *not* where “employees . . . work for one employer at multiple locations,” *id.* at 11 n.82 [JA17]. As the facts of this case illustrate, it is not unusual for employees of a contractor or licensee to work *primarily* for one employer

at one principal worksite while occasionally working for the same employer at another location. It is not self-evident – and the Board does not attempt to explain – why a property owner’s interests are different vis-à-vis employees like the musicians in this case, who occasionally work for the Symphony offsite, as compared to employees whose only work for the contractor is on the property owner’s property, but on a part-time, evening, or short-term basis. *See, e.g., Southern Services*, 300 NLRB at 1158 (most cleaning employees worked four-hour evening shifts); *Gayfers*, 324 NLRB at 1250 n.2 (electricians worked on property only for length of remodeling job).

Relatedly, while it is true that 79 percent of the *Symphony’s* performances and rehearsals were held at the Tobin Center, that statistic underrepresents the full extent of the *musicians’* presence on the Tobin Center property. We have already noted that the Symphony maintained a library at the Tobin Center, staffed by a Musicians’ Union member, throughout the Symphony season, and that the musicians regularly used the Tobin Center property for union meetings and, in some cases, to store their instruments. D&O 3 [JA9]. In addition, the 79 percent figure cited by the Board does not include the musicians’

performances and rehearsals for the Opera undertaken pursuant to the separate CBA between the Musicians' Union and the Opera. D&O 25 n.3 [JA31]. And, because the Symphony sometimes performs in “split orchestras” – *i.e.*, two separate ensembles performing different music on the same day at different locations – on some days when part of the Symphony performs offsite, a separate ensemble performs or rehearses at the Tobin Center. *See, e.g.*, GC Ex. 16 at “Week 9” [JA414] (one Symphony ensemble undertook two rehearsals and four performances of *The Nutcracker* for the Ballet at the Tobin Center, while a separate ensemble performed the *Messiah* at three local churches).

It is indisputable, in other words, that the Tobin Center was “the *locus* of the [musicians'] work place,” *Postal Service*, 339 NLRB at 1177, the only “home base . . . to which [the musicians] report, and at which they could engage in organizational activities.” *Simon DeBartolo*, 357 NLRB at 1892 (Member Hayes, dissenting). Although the musicians did not conduct all of their performances and rehearsals at the Tobin Center, there is no dispute that they undertook a substantial majority of their work at that location such that their relationship with the Center was anything but “fleeting.” *Ibid.* The Board's categorical

conclusion that solely because the musicians did not “perform *all* of their work for [the Symphony] on the [Tobin Center] property,” D&O 3 [JA9], it “could end the inquiry [t]here,” *id.* at 11 [JA17], without also considering whether the Tobin Center was their principal workplace and whether the musicians had some alternative work location to exercise their Section 7 rights, constituted an abuse of discretion. The Board was required to “exercise[] its discretion within the limits this Court ha[s] set forth,” namely, by reaching an “accommodation between the § 7 rights of [the musicians] and the rights of [the Tobin Center] to control the use of its premises, and to manage its business and property.” *New York New York II*, 676 F.3d at 196 & n.2 (citation and quotation marks omitted).

III. THE BOARD’S APPLICATION OF THE *LECHMERE* AND *BABCOCK & WILCOX* “NO REASONABLE ALTERNATIVE MEANS OF COMMUNICATION” REQUIREMENT AS AN ADDITIONAL BASIS TO DENY THE MUSICIANS’ RIGHT TO EXERCISE THEIR SECTION 7 RIGHTS ON THE TOBIN CENTER’S PROPERTY CONSTITUTED AN INDEPENDENT LEGAL ERROR BECAUSE IT TREATED THE MUSICIANS IN THE SAME MANNER AS NONEMPLOYEES

The NLRB’s holding that, “even assuming *arguendo* that” “the Symphony employees did . . . work regularly and exclusively on the [Tobin Center]’s property,” the Tobin Center was entitled to prohibit the

musicians from leafleting because “it is clear that they had other alternative nontrespassory channels of communication to reach the general public,” such as “leaflet[ing] on a public sidewalk across the street from the [Tobin Center]’s property” or using “other channels . . . to convey their message, including newspapers, radio, television, and social media, such as Facebook, Twitter, YouTube, blogs, and websites,” D&O 11 [JA17], was, like the strict definition of the “work both regularly and exclusively on the property” requirement discussed in the previous section, an abuse of the Board’s discretion because it failed to give sufficient weight – indeed, any weight – to the musicians’ Section 7 rights.

The Board makes no secret that it derives this aspect of its test from the Supreme Court’s *Lechmere* and *Babcock & Wilcox* decisions, both cases involving the access rights of nonemployee union organizers, rather than employees. *See, e.g.*, D&O 2 [JA8] (stating that it was overruling *New York New York*, in part, because the decision “arrived at a standard that contravened several guiding principles articulated in *Lechmere* as to the Section 7 rights of nonemployees of the property owner – i.e., off-duty employees of an onsite contractor”); *id.* at 8-9

[JA14-15] (citing *Lechmere* and *Babcock & Wilcox* for the proposition that “there is no reason for the Board to require the property owner to cede its fundamental right to exclude by compelling the property owner to grant access to contractor employees with whom it has no employment or other contractual relationship”) (footnote omitted). In the Board’s view, then, “the off-duty Symphony employees have *no rights* greater than those of other nonemployee strangers under *Lechmere* and *Babcock & Wilcox* to access [the Tobin Center] property.” *Id.* at 12 [JA18] (emphasis added).

That conclusion is incorrect for reasons that *Lechmere* and *Babcock & Wilcox* make clear:

“In cases involving *employee* activities, we noted with approval [in *Babcock & Wilcox*], the Board ‘balanced the conflicting interests of employees to receive information on self-organization on the company’s property from fellow employees during nonworking time, with the employer’s right to control the use of his property.’ In cases involving *nonemployee* activities (like those at issue in *Babcock* itself), however, the Board was not permitted to engage in that same balancing (and we reversed the Board for

having done so.” 502 U.S. at 537 (quoting *Babcock & Wilcox*, 351 U.S. at 109-10) (emphasis in *Lechmere*).

Just as “*Babcock’s* teaching [regarding nonemployees] is straightforward: § 7 simply does not protect nonemployee union organizers *except* in the rare case where ‘the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels,’” *Lechmere*, 502 U.S. at 537 (quoting *Babcock & Wilcox*, 351 U.S. at 112), *Babcock’s* teaching regarding employees is straightforward as well: “the Board [must] ‘*balance*’ the conflicting interests of employees to receive information on self-organization on the company’s property from fellow employees during nonworking time, with the employer’s right to control the use of his property,” *ibid.* (quoting *Babcock & Wilcox*, 351 U.S. at 109-10) (emphasis added).

It was therefore entirely insufficient for the Board to repeatedly invoke the specter of the “dislocation of,” or even “the destruction of,” “property rights,” the property owner’s “essential . . . right to exclude,” and the fact that, at common law, “[a] property owner can remove a trespasser regardless of whether it can show that the trespasser’s

presence interferes with use of the property,” as the sole basis for determining the NLRA access rights of contractor *employees*. D&O 1, 7, 12, 13 [JA7, 13, 18, 19] (footnote omitted in final quotation). As this Court has explained, although “[t]here is an inherent tension . . . between an employer’s property rights and the Section 7 rights of its employees,” it is “a tension that cannot be resolved merely by reference to the law of trespass.” *ITT Indus.*, 413 F.3d at 72 (citation and quotation marks omitted). “Rather, . . . it is ‘the task of the Board . . . to resolve conflicts between § 7 rights and private property rights, and to seek a proper accommodation between the two.’” *Ibid.* (quoting *Hudgens*, 424 U.S. at 521).

The NLRB’s application of its “no reasonable alternative means of communication” test to the musicians in this case illustrates the Board’s basic legal error. As the ALJ observed, in handing leaflets stating, “Demand Live Music,” to Ballet patrons – as they entered the Tobin Center to attend a premier of the Ballet’s performance of *Sleeping Beauty* performed with prerecorded music – the musicians’ “objective was solely to increase *their employment opportunities* in conjunction with the performances of the Ballet.” D&O 26 [JA32] (emphasis

added).⁷ Because the Musicians' Union members routinely performed for the Ballet as members of the Symphony and had demonstrated a willingness to engage directly with the Ballet, similar to the Union's collective bargaining with the Opera, this was a textbook example of "employees . . . exercising their own Section 7 rights." *New York New York II*, 676 F.3d at 199 (Henderson, J., concurring) (citation and quotation marks omitted). Like the Ark employees' leafleting of customers of the casino in *New York New York*, "[t]his fact – that [the musicians] were exercising nonderivative section 7 rights – distinguishes the [musicians] from the nonemployee union organizers in *Babcock & Wilcox* and *Lechmere*." *Ibid.*⁸

⁷ To the extent the Board suggests that the musicians' leafleting was entitled to less protection than other forms of Section 7 activity because it was aimed at customers rather than fellow employees, D&O 9 [JA15], that view has been repeatedly rejected by this Court. *See Stanford Hosp. and Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003) ("[N]either this court nor the Board has ever drawn a substantive distinction between solicitation of fellow employees and solicitation of nonemployees."). *Accord Capital Medical Center v. NLRB*, 909 F.3d 427, 430 (D.C. Cir. 2018); *New York New York II*, 676 F.3d at 196-97.

⁸ Although generally embracing the aggressive stance that "it is simply not necessary to invade private property rights in order to make room for the exercise of Section 7 rights by off-duty contractor employees," D&O 7 [JA13], the Board argued in response to the dissent that, because the property owner carries the burden of "show[ing] that the alternative means of communication is reasonable," its test is

By treating the musicians in the same manner as nonemployees for purposes of determining their right to access the Tobin Center's property for Section 7 activity, the Board failed to account for the "distinction 'of substance,' between the union activities of employees and nonemployees," *Lechmere*, 502 U.S. at 537 (quoting *Babcock & Wilcox*, 351 U.S. at 113). As a result, the Board altogether failed to engage in the "accommodation between the § 7 rights of [the musicians] and the rights of [the Tobin Center] to control the use of its premises, and to manage its business and property," *New York New York II*, 676 F.3d at 196 n.2 (citation and quotation marks omitted), that this Court's precedent requires.

different from that of *Lechmere* and *Babcock & Wilcox*, *id.* at 12 [JA18]. That claimed difference is illusory. Under *Lechmere*, it is presumed that nonemployee union organizers can reach employees offsite, so "the union . . . [must] establish the existence of any unique obstacles that frustrate[] access to [] employees" off the employer's property. 502 U.S. at 541 (citation and quotation marks omitted). Under the Board's standard here, the employer need merely invoke generally-available means of offsite communication – *i.e.*, "leafleting on public property" or the use of "social media, blogs, and websites," D&O 10 [JA16] – and then it falls to the union to make the same showing required by *Lechmere*.

CONCLUSION

The Court should grant the petition for review, vacate the NLRB's decision, and remand this case to the Board.

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1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(b) because this petition contains 11,433 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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/s/ Matthew J. Ginsburg
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Date: July 15, 2020

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2020, the foregoing Final Brief of Petitioner Local 23, American Federation of Musicians was served on all parties or their counsel of record through the CM/ECF system.

/s/ Matthew J. Ginsburg

Matthew J. Ginsburg