

No. 20-1157

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

No. 20-1157

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

THE WANG THEATRE, INC.

Respondent

**ON APPLICATION FOR ENFORCEMENT OF ORDERS OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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TABLE OF CONTENTS

Headings	Page(s)
Statement of subject matter and appellate jurisdiction	1
Statement of the issues	3
Statement of the case.....	3
I. Statement of facts	4
A. 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 2016 decision and Order.....	10
IV. The prior proceeding before the Court	10
V. The Board’s supplemental decision and Order	11
Standard of review	11
Summary of argument.....	13
Argument.....	16
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	16
A. Acting within its broad discretion in unit-determination cases, the Board reasonably found the petitioned-for unit appropriate	18

TABLE OF CONTENTS

Headings	Page(s)
1. The Board possesses broad discretion in determining whether a petitioned-for unit is appropriate under the Act.....	18
2. The petitioned-for unit of musicians employed by the Company is an appropriate unit	19
3. The Company’s remaining challenges to the appropriateness of the unit lack merit	26
 B. The Board acted within its broad discretion in conducting the election among employees who satisfied the voter-eligibility formula in <i>Juilliard School</i> , which promotes enfranchisement in the entertainment industry.....	 32
1. The Board possesses broad discretion to determine which voter-eligibility formula is appropriate to apply in a given case	33
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.....	35
 C. The Board properly granted summary judgment.....	 41
 Conclusion	 46

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Am. Hosp. Ass'n v. NLRB</i> , 499 U.S. 606 (1991).....	18
<i>BB&L, Inc. v. NLRB</i> , 52 F.3d 366 (D.C. Cir. 1995).....	33, 34
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964).....	2
<i>Castaways Hotel</i> , 250 NLRB 626 (1980).....	26
<i>Cent. Transp., Inc.</i> , 328 NLRB 407, 408 (1999).....	19
<i>Chelmsford Food Discounters, Inc.</i> , 143 NLRB 780 (1963).....	31, 32
<i>Columbus Symphony Orchestra, Inc.</i> , 350 NLRB 523 (2007).....	34
<i>Davison-Paxon, Co.</i> , 185 NLRB 21 (1970).....	35
<i>DIC Entm't LP</i> , 328 NLRB 660 (1999), <i>enforced</i> , 238 F.3d 434 (D.C. Cir. 2001).....	34
<i>DIC Entm't, LP v. NLRB</i> , 238 F.3d 434 (D.C. Cir. 2001).....	35
<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).....	12, 18, 19, 32

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Intercity Maint. Co. v. Local 254, Serv. Emps. Int’l Union</i> , 241 F.3d 82 (1st Cir. 2001).....	29
<i>Juilliard Sch.</i> , 208 NLRB 153 (1974).....	16, 32, 34-35, 36, 37, 38, 39, 40, 42, 43
<i>Kan. City Repertory Theatre, Inc.</i> , 356 NLRB 147 (2010).....	25, 37, 39
<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).....	44
<i>Kirkpatrick Elec. Co.</i> , 314 NLRB 1047 (1994).....	45
<i>Knapp-Sherrill Co. v. NLRB</i> , 488 F.2d 655 (5th Cir. 1974).....	13
<i>Lamons Gasket Co.</i> , 357 NLRB 739 (2011).....	44
<i>Lancaster Symphony Orchestra</i> , 357 NLRB 1761 (2011), <i>affirmed</i> , 361 NLRB No. 101, 2014 WL 5871060 (Nov. 12, 2014), <i>enforced</i> , 822 F.3d 563 (D.C. Cir. 2016).....	25
<i>Marriott In-Flite Servs. v. NLRB</i> , 652 F.2d 202 (1st Cir. 1981).....	12
<i>Mass. Soc’y For Prevention of Cruelty to Children v. NLRB</i> , 297 F.3d 41 (1st Cir. 2002).....	12, 18-19, 32, 41
<i>McGaw of P.R., Inc. v. NLRB</i> , 135 F.3d 1 (1st Cir. 1997).....	11

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Miami Fed'n of Musicians, Local 655 (Royal Palm Theatre, Ltd.)</i> , 275 NLRB 677 (1985)	25-26
<i>Moses Elec. Serv., Inc.</i> , 334 NLRB 567 (2001)	22
<i>Ne. Hosp. Corp. v. Sebelius</i> , 657 F.3d 1 (D.C. Cir. 2011)	31
<i>NLRB v. Atkinson Dredging Co.</i> , 329 F.2d 158 (4th Cir. 1964)	13, 40
<i>NLRB v. Horizons Hotel Corp.</i> , 49 F.3d 795 (1st Cir. 1995)	16
<i>NLRB v. Ne. Land Servs., Ltd.</i> , 645 F.3d 475 (1st Cir. 2011)	11, 12
<i>NLRB v. Solutia, Inc.</i> , 699 F.3d 50 (1st Cir. 2012)	11
<i>NLRB v. Westinghouse Broad. & Cable, Inc.</i> , 849 F.2d 15 (1st Cir. 1988)	13, 40
<i>Pittsburgh Plate Glass Co. v. NLRB</i> , 313 U.S. 146 (1941)	41
<i>Quality Health Servs. of P.R., Inc. v. NLRB</i> , 873 F.3d 375 (1st Cir. 2017)	30, 40
<i>Ray Brooks v. NLRB</i> , 348 U.S. 96 (1954)	44
<i>Rice Growers Ass'n of Cal., Inc.</i> , 312 NLRB 837 (1993)	45
<i>S. Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs</i> , 425 U.S. 800 (1976)	18

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Saltwater, Inc.</i> , 324 NLRB 343 (1997)	33
<i>Sandvik Rock Tools, Inc. v. NLRB</i> , 194 F.3d 531 (4th Cir. 1999)	18
<i>Sitka Sound Seafoods, Inc. v. NLRB</i> , 206 F.3d 1175 (D.C. Cir. 2000).....	33, 34
<i>Storall Mfg. Co.</i> , 275 NLRB 220 (1985)	22
<i>Telemundo de P.R., Inc., v. NLRB</i> , 113 F.3d 270 (1st Cir. 1997).....	12, 17, 43
<i>Trump Taj Mahal Casino Resort</i> , 306 NLRB 294 (1992)	33
<i>U.S. Recycling & Disposal, LLC</i> , 351 NLRB 1090 (2007)	29
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	11, 12
<i>Volkswagen Grp. of Am. Chattanooga Operations, LLC</i> , 367 NLRB No. 138, 2019 WL 2212129 (May 22, 2019)	44
<i>Westinghouse Elec. Corp.</i> , 179 NLRB 289 (1969)	45

TABLE OF AUTHORITIES

Statutes	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 2(2) (29 U.S.C. § 152(2)).....	19
Section 2(11) (29 U.S.C. § 152(11)).....	24
Section 7 (29 U.S.C. § 157)	16
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	4, 9, 10, 11, 15, 16, 17, 41
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	4, 9, 10, 11, 15, 16, 17, 41
Section 9(b) (29 U.S.C. § 159(b)).....	18
Section 9(c) (29 U.S.C. § 159(c))	3
Section 9(c)(3) (29 U.S.C. § 159(c)(3)).....	44
Section 9(d) (29 U.S.C. § 159(d)).....	2
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	2, 11, 30
 Regulations	 Page(s)
<i>Joint Employer Status Under the National Labor Relations Act,</i> 85 Fed. Reg. 11,184 (Feb. 26, 2020) (to be codified at 29 CFR pt. 103).....	 31

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**BRIEF FOR
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**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 (Add. 14-16), and enforcement of a Supplemental Decision and Order issued against the

Company on October 30, 2019, and reported at 368 NLRB No. 107 (Add. 20-22).¹ The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (“the Act”). 29 U.S.C. § 151, 160(a). The Court has jurisdiction over this proceeding under Section 10(e) of the Act. 29 U.S.C. § 160(e). Venue is proper because the unfair labor practice occurred in Boston, Massachusetts. The application was timely because the Act places no time limit on the initiation of enforcement proceedings.

As the Board’s unfair-labor-practice Orders are based, in part, on findings made in an underlying representation (union election) proceeding (Add. 14, 20 n.1), 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 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 to resume processing the representation

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

case in a manner consistent with the ruling of the Court. 29 U.S.C. § 159(c). *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 Boston Musicians' Association, affiliated with the American Federation of Musicians, Local Union No. 9-535, AFL-CIO ("the Union"), the duly certified representative of its employees, the local musicians it hires to perform at its theater. The subsidiary issues turn on the Board's rejection of the Company's opposition to the holding of the election:

1. Whether the Board acted within its broad discretion in finding the petitioned-for unit appropriate because the Company is an employer of the musicians.
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 in the entertainment industry.

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 holding an election and certifying the Union. (Add. 14 & n.1, 20.) Having rejected those challenges, the Board found that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act. 29 U.S.C. § 158(a)(5) and (1). The facts and procedural history relevant to both the representation and unfair-labor-practice proceedings are set forth below.

I. STATEMENT OF FACTS

A. The 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. The Theatre hosts theatrical performances, including musical productions, as well as concerts, dance shows, and "star attractions," which are performances by well-known musicians. (Add. 1, 20; A. 22-23.) 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. The Company's contracts with producers consist of two general types. (Add. 1, 20; A. 22-26.) 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, 20; 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, 20; 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, 20; A. 22, 29.) If live music is chosen, producers also determine whether to hire local musicians and, if so, how many.² (Add. 2-3, 20; A. 27.) Typically, producers supply at least some of the necessary musicians, known as “traveling musicians,” who tour with the production. (Add. 2, 20; 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, 20; A. 27, 195, 220.) When the latter occurs, the producers specify the number and type of musicians needed and the Company’s local contractor—who is its employee—then decides which local musicians to hire for the production. (Add. 2, 20; A. 27-28, 56-57.) Once the Company hires the local musicians, they practice and perform at its facility and receive their salary through company payroll. (Add. 20; A. 28, 184-87.) Finally, producers directly employ the conductor, who has artistic control over the musicians’ performance (what

² 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, n.4; A. 62-64, 67, 113.)

music is played and how it is played), whether they are traveling musicians or local musicians. (Add. 3, 20; A. 30-32.)

From 2004 to 2007, the Company and the Union were parties to a collective-bargaining agreement that covered the same employees involved in this case—locally hired musicians. (Add. 2, 20; 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, 20; A. 30-31.) After that 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, 20-21; 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 who work in wardrobe, the box office, and loading and unloading 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. The 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. 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 seeking to represent a bargaining unit of the Company's musicians.³ (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. (Add. 3-5.) In the decision, the Acting Regional Director found the

³ 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.)

petitioned-for unit appropriate because the Company was an employer of the musicians and directed an election among the musicians who satisfied the applicable voter eligibility standard. (Add. 1, 3-5.) The Company then requested review of the Acting Regional Director's decision. (A. 348.) While that 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 3, 2016, the Board (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 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 2016 DECISION AND ORDER

On November 10, 2016, the Board (Chairman Pearce and Members Miscimarra and McFerran) issued its Decision and Order finding that the Company had violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union. 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. (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.)

The Company thereafter 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).

IV. THE PRIOR PROCEEDING BEFORE THE COURT

The Board subsequently filed an application with this Court seeking enforcement of its 2016 Order. *See NLRB v. The Wang Theatre, Inc.*, No. 17-1650. After the close of briefing and before the scheduled argument was held, the Board, through its General Counsel, moved the Court to remand the case for reconsideration in light of an intervening Board decision. The Court granted the

unopposed motion and remanded the case to the Board on January 31, 2018. (Add. 20.)

V. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER

On October 30, 2019, the Board (Chairman Ring and Members McFerran and Kaplan) issued its Supplemental Decision and Order reaffirming its finding that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the properly certified representative of its musicians. (Add. 20-22.) The Board, therefore, affirmed its 2016 Decision and Order and again ordered the Company to take the remedial actions set forth in it. (Add. 22.)

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

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)). Absent "extraordinary circumstances," the Court confines its review of the Board's unit determination to the then-existing facts: "The regulatory scheme is explicit; the Board determines the appropriateness of a bargaining unit based upon the conditions of employment as they exist at the time of the hearing" *Telemundo de P.R., Inc., v. NLRB*, 113 F.3d 270, 277 (1st Cir. 1997).

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). Consequently, a party challenging the Board's determination as to the appropriate voter-eligibility formula for a specific case bears the burden of showing that determination 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"). *See also Knapp-Sherrill Co. v. NLRB*, 488 F.2d 655, 659 (5th Cir. 1974) (same).

SUMMARY OF ARGUMENT

1. Acting within its broad discretion to make bargaining-unit determinations, the Board reasonably found that the petitioned-for unit of local musicians employed by the Company was appropriate; accordingly, the Board properly denied the Company's request to dismiss the election petition. 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 then practice and perform at the Company's facility and are paid through company payroll.

The Board reasonably rejected the claim that the unit was inappropriate because the Company failed to carry its burden of proving its claim that the producers, not it, control the musicians' employment terms. Outside of "artistic control" over the musicians' performance, there was no evidence the producers exercise any other type of traditional supervisory control. In continuing to challenge the unit's appropriateness, the Company presses claims contrary to the evidence, relies on legally and factually distinguishable cases, and engages in speculation regarding the futility of future bargaining with the Union.

2. Exercising its broad discretion in the election context, the Board reasonably applied the established formula in *Juilliard School* to determine that the local musicians were eligible to vote such that the election was properly held. Here, the local musicians work in the theater, which is subject to irregular work patterns. Under Board law, special circumstances therefore warrant the use of a more inclusive eligibility formula, lest the musicians be disenfranchised based on the characteristics of their profession. In addition, *Juilliard School's* formula is applicable to the case, with the evidence meeting that standard as the Company

employed some local musicians for at least 15 days within the relevant prior 2-year period, thus making those individuals eligible to vote.

The Company has not carried its burden of demonstrating that the Board's voter-eligibility determination was in error. It specifically asserts that the Board erred in applying *Juilliard School* because there was no unit work within the year preceding the election and thus the musicians lacked a real continuing interest in bargaining. As the Board found, the first assertion lacks any support in Board precedent and is contrary to *Juilliard School*, which expressly permits elections in those circumstances, and the Board has found the latter contention unpersuasive in the unique context of theater employees.

3. There is no merit to the Company's final 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 meritless—and speculative—claim that it does not currently employ any local musicians and will not do so in the future, a claim 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 contravenes that duty and violates Section 8(a)(5) and (1) of the Act.⁴ 29 U.S.C. § 158(a)(5) and (1).

See NLRB v. Horizons Hotel Corp., 49 F.3d 795, 806 (1st Cir. 1995).

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. Upon the Board's ensuing certification of the Union,

⁴ A violation of Section 8(a)(5) "necessarily violates" Section 8(a)(1). *NLRB v. Horizons Hotel Corp.*, 49 F.3d 795, 806 (1st Cir. 1995). That section makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7" of the Act. 29 U.S.C. § 158(a)(1).

the Company was therefore obligated to recognize and bargain with the Union, and its failure to do violates the Act.

Here, the Company does not dispute that it has refused to recognize and 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. In particular, then and now the Company argues that the producers, and not it, control the musicians' terms and conditions of employment, and no musicians satisfy the voter-eligibility standard because there were, and currently are, none in the unit. As will be discussed, those arguments chiefly fail because the Company has not carried its burden of proving them or that the Board's contrary findings and determinations are unsupported by the record or otherwise erroneous. In pressing its arguments, the Company also seeks to draw the Court's attention to alleged factual developments outside the hearing record, which impermissibly shifts the proper focus from the record evidence as it existed before the Board. Accordingly, because the Company cannot prevail in its 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.*, 113 F.3d at 272, 279.

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 a 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 an appropriate unit

Exercising its broad discretion, the Board reasonably found that “the petitioned-for employees constitute an appropriate unit for collective bargaining.” (Add 1.) As the Board found, “the [Company] is an employer of the local musicians within the meaning of Section 2(2) of the Act [29 U.S.C. § 152(2)] and the petitioned-for single employer unit is presumptively appropriate under the Act.”⁵ (Add. 21; *see also* Add. 4 (citing *Cent. Transp., Inc.*, 328 NLRB 407, 408 (1999)).) In making that determination, the Board reasonably rejected the Company’s claim that the unit is inappropriate because it is not the local musicians’ statutory employer where various producers control their employment

⁵ Section 2(2) provides in relevant part that the “term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly.” 29 U.S.C. § 152(2).

terms. (Add. 3.) In seeking to dismiss the election petition on that basis the Company bore the burden of proving the producers' control, but failed to do so.

The Board's finding that the unit—limited to the Company as an employer of the musicians—constitutes an appropriate one is reasonable given the record evidence. Significantly, the Company was the musicians' undisputed—and sole—employer for a three-year period, from 2004 through 2007, when it was party to a collective-bargaining agreement covering the petitioned-for unit here. (Add. 3-4, 20; A. 30, 102-34, 139.) As shown (p. 6), the agreement contained the types of terms and conditions of employment that 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—acknowledged that since the expiration of the prior bargaining agreement, the Theatre operates in the same manner and nothing is different as to the respective responsibilities and authority of the producers and the Company. (Add. 3-4, 20-21; A. 37-38, 205.) Based on that evidence, the Board found that the situation “remain[s] unchanged” and aptly observed that “[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.” (Add. 4.)

Next, the Board found “it appears that the [Company] hires the employees and as such clearly is an employer under the Act.” (Add. 3; *see also* Add. 20.)

Thus, the evidence establishes that a company employee exercises discretion in choosing which available local musicians to hire for a production because producers merely request the number and type of musicians needed. (A. 27-28, 56-57.) Furthermore, after the Company hires them, the local musicians then practice and perform at its facility and are paid the local union wage scale through company payroll. (Add. 20; A. 28, 184-87.)

Given the preceding evidence and the prior bargaining agreement, which encompassed typical employment terms between an employer and its employees, the Company's assertion that "it never employed" the local musicians rings hollow. (Br. 26.) Likewise, the Company misses the mark in arguing (Br. 28) that there is no employer-employee relationship here because it operates "as a mere hiring and payroll agent" of the producers. The Board's finding, however, is supported by more than just evidence that the Company places the musicians on its payroll and pays them through it. As discussed (pp. 20-21), the evidence of its status as an employer includes the prior bargaining agreement, the concession that the relationship between the Company and producers remains unchanged since that time, and the Company exercising discretion when choosing which local musicians to hire. Taken together, the totality of the evidence also disproves the notion it is merely a hiring agent.

The cases cited by the Company in support of its hiring/payroll agent argument are plainly distinguishable. (Br. 28.) In one, there was no claim that a staffing company was an employer; instead, 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, an entity provided temporary employees to the actual employer, which had control and supervision over them and could refuse to work them, and it handled “administrative paperwork, skill qualifying, interviewing, reference, verification, payroll, and insurance.” *Storall Mfg. Co.*, 275 NLRB 220, 221 n.3, 239 (1985). The Board found this evidence only showed the entity’s status as an agent of the actual employer, not a joint employer. *Id.* at 221 n.3.

In finding the petitioned-for unit appropriate based on the adduced evidence, the Board reasonably rejected the Company’s position that it is not an employer of the musicians and the producers instead exercise the relevant control. (Br. 26-31.) Significantly, the Company bore the burden of proving that claim but, as the Board found, there “is little evidence in the record concerning the traditional indicia of the employer-employee relationship relative to the producers” and the local musicians. (Add. 3.)

With respect to hiring, the Company claims that the producer has sole discretion over whether any local musicians need to be hired. (Br. 31.) The Board, however, found that “this term of employment is ultimately determined by the contract negotiated between the [Company] and the producer.” (Add. 3.) As the record shows, the Company (through its counsel) drafts those contracts when negotiating with a given producer over the use of its Theatre and the local musicians it provides. (A. 43, 46-47, 49.) Therefore, there may be some variability in the producers’ discretion. Likewise, to the extent the record is “silent” as to who controls most of the local musicians’ terms and conditions of employment, the Board emphasized that “these terms are ultimately determined by” those same company-drafted contracts. (Add. 20.)

The Board also found the Company’s contention undermined by the 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” (Add. 3.) Instead, as shown (pp. 20-21), the Company alone exercises discretion in choosing which available local musicians to hire for a given production, contrary to its blanket assertion that it has “no authority over the hiring of local musicians.” (Br. 31.)

The Board, moreover, fully acknowledged the Company's point that the producer's conductor exercises "artistic control" over the musicians. (Br. 26-27.) However, the Board found that there was otherwise "no evidence indicating where other traditional supervisory authority lies," except for evidence that the Company hires the musicians.⁶ (Add. 3.) Although the Company asserts (Br. 27) that the "conductors of the producers, alone, supervised and directed" the musicians' work, the Board properly found that the record only shows the conductors exercising "artistic control" (Add. 3; A. 29-32), meaning "what music is performed and how it is played" (Add. 20). Despite bearing the burden of proving the claim, the Company offered "no evidence" indicating whether conductors possess any supervisory authority other than artistic control. (Add. 3.) However, countervailing record evidence, for instance, shows the Company explicitly reserved to itself disciplinary authority in the prior bargaining agreement (A. 126-27), which also included a section titled "Control of Musicians" providing that "[t]he [Company] shall at all times have complete control of the services rendered by its Musicians under this Agreement" (A. 118).

⁶ Under the Act, indicia of supervisory status include the authority "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline 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).

In light of the paucity of evidence put forward by the Company to prove that the producers actually control the local musicians' terms and conditions of employment, the Company fails to advance its argument by citing several legally and factually distinguishable cases. (Br. 28.) Legally, each case addressed the separate question of whether the musicians were employees or independent contractors.⁷ Moreover, unlike here, the cases were replete with evidence establishing that the musicians were the employees of each respective employer.

For instance, in one case, the orchestra determined which musicians to hire, maintained extensive guidelines for behavior, and had imposed and threatened discipline for violating its rules. *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1763-64 (2011), *aff'd*, 361 NLRB No. 101, 2014 WL 5871060 (Nov. 12, 2014), *enforced*, 822 F.3d 563 (D.C. Cir. 2016). In another, the theater (through its music director) set the time and place for the recording session, established the seating arrangement, determined the hours to be worked and the length of rehearsal, decided on the need for overtime and how much to pay for it, and specified when breaks would occur. *Miami Fed'n of Musicians, Local 655 (Royal Palm Theatre*,

⁷ Contrary to the Company's suggestion, the musicians' status as employees and the theater's status as employer were not at issue in *Kansas City Repertory Theatre, Inc.*, 356 NLRB 147 (2010). The case concerned the different question of whether, as the theater argued, the musicians were ineligible to vote under any eligibility formula because they were "temporary or irregularly employed casual employees." *Id.* at 147.

Ltd.), 275 NLRB 677, 678, 680-82 (1985). In the final case, the hotels hired musicians and expressly reserved “complete supervision, direction and control over” them, including as to discipline, in employment contracts. *Castaways Hotel*, 250 NLRB 626, 634 (1980). Consistent with that, the hotels decided whether to alter assignments and have musicians perform in different locations, mediated scheduling conflicts, approved substitutes if a musician was unavailable, reprimanded musicians, and ordered them to take unpaid leave. *Id.* at 639-40, 642-45. Therefore, in finding the musicians to be employees of their respective employers, the cases did not solely turn on artistic control, which is what the Company urges here.

3. The Company’s remaining challenges to the appropriateness of the unit lack merit

There is no merit to the Company’s assertion that the petitioned-for unit is inappropriate because “certifying the [Union] could not effectuate collective bargaining as defined by the Act.” (Br. 30.) That assertion rests on its dual claims that the approved unit is inappropriate because (1) the producers control the hiring of musicians, and thus 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. (Br. 30-33.) Principally, as the Board reasoned (Add. 14), the Company’s underlying—and oft repeated—unproven contention (Br. 26-28, 31) that the producers, and not it, control the

musicians' employment was raised and rejected in the representation proceeding, as just discussed.

To the extent the Company questions (Br. 30) unit's appropriateness because it maintains that there is allegedly nothing for the parties to lawfully bargain over, an answer and rebuttal is found in the parties' prior bargaining agreement, which the Board relied upon in its decision (Add. 3-4). As the record establishes, that agreement included a bevy of terms and conditions of employment that the Company controlled and previously bargained over with the Union. (A. 102-34.) 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. Although the Company avers that its relationship with the Union lapsed in 2007 "because the parties understood, even then, that they had nothing lawful to bargain over," the citations to the record that it relies on do not support that assertion and confirm only that the prior bargaining relationship ended in 2007. (Br. 30 (citing Add. 2, 20).) The Company thus has failed to demonstrate that it no longer controls, and thus cannot bargain over, the musicians' terms and conditions of employment.

The Company further claims (Br. 31) that unit work is dependent on the producers, who determine whether and how many local musicians to hire and sometimes directly hire musicians, but 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 notion that a new bargaining agreement would be unworkable. Although the Company posits that the Union necessarily will seek to bargain over terms and conditions of employment outside its control (Br. 30-32), that claim was—and remains—speculative when it has to date refused even to begin the bargaining process. 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 that claim could be litigated in a subsequent proceeding.

There is also no merit to the Company's specific assertion that the Union seeks an unlawful work preservation clause prohibiting it from renting the Theatre to producers unless they agree to lay off traveling musicians and hire local ones. (Br. 31-33.) 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. 32) 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 Musicians, venue staffing, and the hiring of local musicians.⁸ (A. 15-17, *see also* A. 12-15, 17-20.) Regardless, it is well established that statements by counsel are not evidence, *Intercity Maint. Co. v. Local 254, Serv. Emps. Int'l Union*, 241 F.3d 82, 88 n.4 (1st Cir. 2001); *U.S. Recycling & Disposal, LLC*, 351 NLRB 1090, 1093 (2007), let alone an operative bargaining demand.⁹ However, if the Union were to make an assertedly unlawful bargaining demand in the future, the Company may, as noted, file an unfair-labor-practice charge over that conduct and that claim could be litigated in a subsequent proceeding. The mere possibility of such a future demand, however, is not an impediment to enforcing the Company's basic bargaining obligation now.

⁸ Counsel mentioned that producers typically have bargaining agreements with the American Federation of Musicians 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 certain cities, such as Boston. (A. 17.) When explaining what would happen if the producer had no contract with the Federation, counsel gave the example of an agreement the Union has with an opera house, which requires non-union producers to lay-off half of the traveling musicians in favor of local ones. (A. 17-18.)

⁹ The Company likewise gains no ground by pointing to arguments concerning the permissibility of a work preservation clause that the Union made in its intervenor brief when this case was previously before the Court. (Br. 33.) The Union has not intervened nor has it filed a brief making that argument in the present proceeding and, in any event, the lawfulness of a demand for any work preservation clause would be a matter for the Board to resolve.

Finally, the Court lacks jurisdiction to consider the Company's inexplicable argument that the Board "evad[ed] the joint employer issue." (Br. 29.) Pursuant to Section 10(e) of the Act, that contention is jurisdictionally barred because the Company failed to first raise a joint-employer argument before the Board. *See* 29 U.S.C. § 160(e) ("[n]o objection that has not been urged before the Board . . . shall be considered by the court," absent extraordinary circumstances); *Quality Health Servs. of P.R., Inc. v. NLRB*, 873 F.3d 375, 381 (1st Cir. 2017) (discussing Section 10(e)).

As the Board explained in its supplemental decision, "the record in the underlying representation case establishes that the [Company] did not raise any joint-employer arguments to the Acting Regional Director or to the Board." (Add. 21.) To the contrary, in a pleading to the Board the Company "expressly stated that [it] 'does not claim a joint-employer unit is appropriate'" and further stated that "joint employer status was 'entirely irrelevant.'" (Add. 21 (quoting A. 355).) "Thus, by [its] own admission, no joint-employer argument was placed before the Board in the representation proceeding" and the Company "accordingly waived" any argument that "the Board should have engaged in a joint-employer analysis."

(Add. 21.) Because the Company never raised such an argument before the Board, the Court is consequently barred from addressing it.¹⁰

Notwithstanding the jurisdictional bar, there is no merit to the Company’s specific argument that joint employer status is relevant, or to its overarching—but unproven—argument that the unit is inappropriate because the producers, not it, are the local musicians’ employer. As the Board clarified, under well-established precedent “the existence of potential joint employers is not relevant where, as here, the record establishes that the petitioned-for employer is *an* employer of the petitioned-for employees.” (Add. 21 (discussing *Chelmsford Food Discounters, Inc.*, 143 NLRB 780, 781 (1963)).) The record, as discussed, includes the parties’ prior bargaining agreement, the concession that the relationship between the Company and producers remains unchanged since that time, the Company exercising discretion when choosing which local musicians to hire, and musicians practicing and performing at its facility and receiving compensation through

¹⁰ In addition to the argument being jurisdictionally barred, the Company errs by relying on the Board’s new joint-employer standard to challenge the Board’s findings. (Br. 29, *see also* 27.) The final rule containing that standard was not published until February 26, 2020, and it was not effective for another 60 days—many months after the Board’s October 2019 supplemental decision (Add. 20). *See Joint Employer Status Under the National Labor Relations Act*, 85 Fed. Reg. 11,184, 11,184 (Feb. 26, 2020) (to be codified at 29 CFR pt. 103). It is well settled that agency rulemaking generally is prospective only, absent express congressional authorization permitting retroactive application of new rules. *See generally Ne. Hosp. Corp. v. Sebelius*, 657 F.3d 1, 13 (D.C. Cir. 2011).

company payroll. Moreover, as shown, the Company failed to prove that the producers control the musicians' terms and conditions of employment.

As the Board explained, “[p]rovided that the requisite employer-employee relationship exists,” then “the Board has long maintained that if a petitioner seeks [to represent] the employees of an employer, it will not require the naming of all potential joint employers and the litigation of their potential relationship with the named employer.” (Add. 21 (citing *Chelmsford*)). Thus, based on the evidence demonstrating that the Company is an employer of the local musicians, then consistent with *Chelmsford* any additional employers are not relevant in determining the appropriateness of the petitioned-for unit.

Accordingly, the Board reasonably found the petitioned-for unit appropriate and the Company failed to prove otherwise based on its claims regarding the producers' control. Before the Court, the Company therefore has not carried its heavy 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 Satisfied the Voter-Eligibility Formula in *Juilliard School*, 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

local musicians in the petitioned-for unit were eligible to vote and, therefore, ordered an election.

1. The Board possesses broad discretion to determine which voter-eligibility formula is appropriate 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 Casino Resort*, 306 NLRB 294, 296 (1992)). Thus, for example, the Board’s standard eligibility formula permits all full time or regular part time employees to vote if they are employed during the payroll period immediately preceding the order directing an election. *See Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1178 (D.C. Cir. 2000) (citing *Saltwater, Inc.*, 324 NLRB 343, 343 n.1 (1997)).

However, “[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*, 206 F.3d at 1178 (quoting *BB&L*, 52 F.3d at 370). The Board, therefore, has fashioned eligibility 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.¹¹ 208 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*).

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 that the eligibility formula set forth in *Juilliard School* was "appropriate and applicable" in the present case based on the record before it. (Add. 4.) With regard to the Board's finding 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." (Add. 4; A. 22-23,

¹¹ 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").

31-32.) During the relevant period—the two years preceding the underlying Decision and Direction of Election—the Company twice hired local musicians (for *Annie* and *White Christmas*), both times in 2014.¹² (A. 27, 180, 195, 220.) As the Board found, absent the application of an alternative eligibility standard, employees may be disenfranchised simply because they work in the entertainment industry, which by its nature is subject to irregular and fallow periods of employment. (Add. 5.)

The evidence also supports the Board’s subsequent finding that the eligibility formula in *Juilliard School* was applicable to the petitioned-for unit of local musicians. (Add. 4-5.) Here, the Company employed some employees in the petitioned-for unit for at least 15 days within the relevant 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, 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. (Add. 4; A. 31-32, 180.)

Further, “for each of the two productions [*Annie* and *White Christmas*] in 2014 that

¹² Specifically, in order to vote a musician must have satisfied the *Juilliard School* formula by January 22, 2016, which coincided with the end of a company payroll period. (Add. 10-11.)

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 that 16 local musicians in the petitioned-for unit met the *Juilliard School* eligibility standard for the relevant period, which permitted them to vote in the representation election. (A. 384.)

Under similar circumstances, the Board found the application of the *Juilliard School* eligibility formula warranted. *See Kan. City Repertory Theatre, Inc.*, 356 NLRB 147, 147, 149-51 (2010). In *Kansas City Repertory Theatre*, the employer had staged an annual musical production for the three preceding performance seasons and staged two of three musicals for the current season at the time of the representation hearing. *Id.* at 149. Due to their infrequency, the employer hired musicians on an “as needed” basis for its musical productions, which ran between 25 and 45 performances. *Id.* It employed 10 musicians for its current musical and anticipated hiring 2 for the subsequent production. *Id.* Notably, of the 10 musicians, only 3 had ever previously worked for the employer, which was not considering hiring any of the 10 musicians for its upcoming musical. *Id.* Thus, notwithstanding that the musicians worked for the employer once, for a limited time, with no expectation of being rehired and were not, in fact, usually rehired, the Board concluded that the employer’s

musicians who worked intermittently were eligible to vote under *Juilliard School*, including musicians from prior performance seasons. *Id.* at 147, 150-51 & n.4.

In applying *Juilliard School*, the Board properly rejected the Company's position that none of the local musicians were eligible to vote because there was no work in the unit within the prior year. (Br. 23-25.) The Board acted well within its discretion 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. (Add. 5.) As the Board reasoned, "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." (Add. 5.) *Juilliard School*, therefore, 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. Thus, that case "make[s] it clear that the Board explicitly rejected the [Company's] reasoning." (Add. 5.) In its brief, the Company cites no authority to suggest that the relevant period is, contrary to *Juilliard School's* clear language, limited to one year, and it does not challenge the validity of *Juilliard School*. (Br. 22-25.)

The Company further asserts the absence of unit work in the preceding year dictates that the local musicians had no real continuing interest in bargaining over employment terms. (Br. 23, 25.) The Board, however, has addressed a similar continuing-interest challenge, also in the theater context, and found it wanting in *Kansas City Repertory Theatre*, a decision it relied on here. (Add. 5.) As the Board reasoned in that case, “[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 conclude 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.*

Consistent with the finding that the petitioned-for unit, with the Company as an employer, is an appropriate one (pp. 19-32), the foregoing considerations equally apply to the local musicians at issue here, who otherwise satisfied the eligibility standard in *Juilliard School*. Moreover, as set forth above (pp. 12-13, 33-35), the Board possesses expertise and broad discretion in matters involving representation elections and the courts defer to the Board’s policy choices concerning representational issues, including with regard to voter eligibility and

ensuring optimum enfranchisement. *See, e.g., Westinghouse Broad.*, 849 F.2d at 18. Based on the evidence, the Board therefore reasonably applied *Juilliard School* as the appropriate eligibility standard to determine whether the local musicians were eligible to vote in an election, and the Company has not carried its burden of demonstrating that the application was in error. *See, e.g., Atkinson Dredging*, 329 F.2d at 164.

Finally, starting with its recurring assertion that the local musicians are not “employees” under the common law (Br. 22-25), the Company argues (Br. 24) that the Board “creat[ed] a new exception to the need of employees in a unit” and “created a pre-hire arrangement,” contrary to Congress’ judgment. The Company, however, never raised any of these claims before the Board. In particular, it only disputed what eligibility standard should apply and argued that the local musicians were ineligible to vote due to insufficient work hours—not because they failed to qualify as common law “employees.” (Add. 1, 4-5, 14; A. 319-32, 348-62, 408-19, 440-46.) The Court, therefore, lacks jurisdiction to consider these claims. *Quality Health Servs.*, 873 F.3d at 381. In any event, the Board did not create a pre-hire arrangement in finding some local musicians eligible to vote. Instead, as shown, the Board adhered to its established voter-eligibility precedent, which determines and optimizes employee enfranchisement in the entertainment industry based on past employment patterns, even where those patterns are irregular or sporadic. It is

the Company that seeks to change precedent by disenfranchising employees based on assertions of future employment patterns.

C. The Board Properly Granted Summary Judgment

In addition to challenging the Board's certification of the Union in the underlying representation proceeding, the Company also claims that the Board erred by granting summary judgment in the subsequent unfair-labor-practice case where it "could have mooted its prior errors." (Br. 34.) Specifically, the Company argues that it has not violated Section 8(a)(5) and (1) of the Act because it has no duty to bargain where the unit has no employees. (Br. 34-36.) In support, it repeats its claim (stated elsewhere (Br. 24-25)) that it does not currently employ any musicians and there will be no unit employees in the future because producers continue to directly hire local musicians (Br. 35-36).

Preliminarily, under established precedent, which the Company does not dispute, the Board found in its 2016 decision that the foregoing claim was not "properly litigable in [the] unfair labor practice proceeding" because it was "or could have been litigated in the underlying representation proceeding." (Add. 14.) *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941) (absent exception, a party cannot relitigate a 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 reasonably found no need to reexamine its decision in the representation case and there were no other properly litigable issues in the unfair-labor-practice case. (Add. 14.) Accordingly, summary judgment was appropriate.

In any event, the Board reasonably rejected the Company's contention, finding it "without merit." (Add. 14 n.1.) As discussed (pp. 36-37), the evidence unquestionably demonstrates that the local 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, 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." (Add. 14 n.1.) Thus, even as late as the Board's original unfair-labor-practice decision, 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.)

As for the Company's contention regarding the future composition of the unit, the Board aptly found it to be "mere speculation" and thus insufficient to

warrant an additional hearing. (Add. 14 n.1.) The Company should not be heard to disparage the Board's finding by claiming that developments prove that no one would satisfy the *Juilliard School* eligibility standard by late 2016, early 2017, or 2019 (Br. 35-36), and the Board improperly "denied [its] objection" that such post-hearing evidence was relevant (Br. 37). In support of the former, it cites (A. 426-28, 431) only an affidavit and a list of productions attached to its opposition to summary judgment (A. 408-19) from the unfair-labor-practice proceeding, and, for the latter, the Board's 2016 and 2019 decisions and 2017 order denying reconsideration (Add. 14-22).

Contrary to the Company's reliance on post-hearing (alleged) facts, the Board was tasked with deciding this case based on the record before it, which limits the scope of review. *See Telemundo de P.R.*, 113 F.3d at 277; *see generally id.* at 278 ("Facts which *arise* only after the hearing has been concluded and the record closed are irrelevant"). Even assuming that the Company has not employed any musicians since December 2014, as it claims (Br. 35-36), there is no reason to refuse to give effect to employees' votes based on speculation that no future producer will ever request local musicians. The Company's persistent refusal to recognize or bargain with the duly certified union has postponed bargaining into the future that it previously speculated about, and it should not enjoy the fruits of such an unfair labor practice.

The Board concluded that, by making the foregoing argument, “[i]n essence the [Company] is asserting that the Union’s certification . . . should not be honored during the certification year.”¹³ (Add. 14 n.1.) However, the Board found that the Company had failed to demonstrate “any ‘unusual circumstances’” such that its obligation to bargain is relieved. (Add. 14 n.1.) 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. 35-36) are factually inapposite and, consequently, the Board did not (Br. 34) “misread its precedent” in rejecting the Company’s contention that its duty to bargain is excused because there are no employees in the unit. In two cases, changes to the units’ size resulted in

¹³ 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)). “Where an employer exercises its right to pursue judicial review of a certification, the certification year will begin with the first bargaining session held following court enforcement of the Board’s order.” *Volkswagen Grp. of Am. Chattanooga Operations, LLC*, 367 NLRB No. 138, 2019 WL 2212129, at *1 (May 22, 2019).

permanent single-employee units, which an employer need not recognize or bargain with under Board law. *See 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). In another 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).

* * *

The Company failed to meet its burden of proving that the Board acted outside its broad discretion in conducting an election among local musicians employed at its theater. Although it points to the unique arrangements and sporadic employment inherent in the nature of the entertainment industry, under established law those circumstances do not warrant abandoning the Board's policy of maximizing employee enfranchisement and guaranteeing employees their Section 7 right to choose whether collective bargaining will benefit them.

CONCLUSION

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

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National Labor Relations Board

July 2020

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

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	No. 20-1157
)	
v.)	Board Case No.
)	01-CA-179293
THE WANG THEATRE, INC.)	
)	
Respondent)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that the foregoing contains 10,342 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word for Office 365.

/s/ David Habenstreit
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Dated at Washington, DC
this 17th day of July 2020

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2020, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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Dated at Washington, DC
this 17th day of July 2020