

Case No. 20-1157

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

---

NATIONAL LABOR RELATIONS BOARD,

*Petitioner*

v.

WANG THEATRE, INC.,

*Respondent.*

---

---

**Application for Enforcement of the Decision and Order of  
the National Labor Relations Board in  
Case No. 01-CA-179292, Reported At 368 NLRB No. 107.**

---

**REPLY BRIEF OF RESPONDENT  
WANG THEATRE, INC.**

---

Arthur G. Telegen  
SEYFARTH SHAW LLP  
Seaport East, Suite 300  
Two Seaport Lane  
Boston, MA 02210  
(617) 946-4800

Dated: August 10, 2020

## TABLE OF CONTENTS

INTRODUCTION .....	1
ARGUMENT .....	3
I.    The Original Certification Requires An Unjustified And Unexplained Expansion Of Board Law. ....	3
II.   The Board Disregards The Significance Of The Continuing Empty Bargaining Unit. ....	4
III.  The Board Disregards The BMA’s Unlawful Bargaining Agenda.....	5
IV.  The Board Disregards The Pointlessness Of The BMA’s Bargaining Goals.....	6
V.   WTI’s Reference To The Unlawfulness Of The Board’s Certification Of A Pre-Hire Arrangement Is Not A New Argument.....	7
CONCLUSION .....	8

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Chamberlain Group, Inc. v. One World Technologies, Inc.</i> , 944 F.3d 919 (Fed. Cir. 2019) .....	8
<i>Dugan v. Sullivan</i> , 957 F.2d 1384 (7th Cir. 1992) .....	8
<i>Julliard School</i> , 208 NLRB 153 (1974) .....	3, 4
<i>Laird v. Air Carrier Engine Service, Inc.</i> , 263 F.2d 948 (5th Cir. 1959) .....	6
<i>U.S. v. Sarwar</i> , 353 Fed. Appx. 347 (11th Cir. 2009).....	6
<b>Statutes</b>	
29 USC § 158(f).....	3
29 USC § 159(c)(3).....	4

## INTRODUCTION

The Board suggests that this case presents a straightforward application of familiar principles of deferral to agency expertise coupled with WTI's failure to prove its case to the Board. As the Board explains, it set a reasonable standard for the definition of a bargaining unit in the music industry. The Board further explains that all of WTI's claims about the lack of employees in that unit and the absence of any lawful subjects of bargaining are speculative. WTI should just be ordered to bargain with the BMA and what will be, will be.

WTI disagrees. The Board has not before or since ordered an employer to bargain over a purported unit where there have not been employees in the defined unit for over a year, let alone where there was no proof there ever would be, as is the case here. The Board should acknowledge the change and explain what limits there are on certification of empty bargaining units.

Even less sensible is the Board's position that the emptiness of the unit into the future was, is, or will be speculative. The unit was empty at the time of the petition. It remained empty throughout the entire time of the Board's bargaining order and its revisiting of that order. Now the Board wants to keep from the Court evidence that the unit remains empty. And the Board refuses to acknowledge why the unit will always be empty. WTI's sourcing of employees for the producers was always just a matter of convenience for the producers. The BMA then said that it

wanted to bargain with WTI so that WTI would be required to cease doing business with the producers, unless the producers would accede to the BMA's goals to maximize local musicians at the expense of touring musicians and recorded music. There's no doubt that the producers decided from then on to forego the convenience of going through WTI and source their own local musicians rather than acceding to the BMA.

The Board also labels the BMA's bargaining goals themselves as speculative, despite the BMA's consistent repetition of the goals before the Board and this Court. While the Board tries to avoid the admissions of the BMA's counsel articulating those goals, those admissions are binding on the BMA.

Additionally, over and over, the Board relies upon the existence of a collective bargaining agreement between WTI and the BMA that expired in 2007 as proof that there are issues over which they could bargain. The Board would have the Court ignore the rest of the story. The Record shows that WTI rejected the BMA's efforts to bargain over the use of recorded music by the producers. The contract then lapsed without renewal because there was nothing for the parties to bargain over. History proves the futility of collective bargaining not its potential.

Further, the Board objects to WTI's characterization of the Board's position as seeking a pre-hire bargaining order not sanctioned by Congress, saying that WTI did not make this argument to the Board. WTI has said throughout this proceeding

that it did not employ any musicians and that there was no reason to believe that it would in the future. It has always been WTI's position that it cannot be ordered to bargain over an empty unit, where the BMA's goals are unrelated to terms and conditions of employment of any specific individuals. That such bargaining was not sanctioned by Section 8(f) of the Act is just a related phrasing of that argument. As such, it is not objectionable.

Rather than explaining to the Court why the order it seeks makes any sense, the Board has devoted itself to dodging reality.

## ARGUMENT

### **I. The Original Certification Requires An Unjustified And Unexplained Expansion Of Board Law.**

The Board refuses to justify its application of *Julliard School*, 208 NLRB 153 (1974). *Julliard* dealt with a genuine "fluctuating" work force. *See id.* at 153-54. *Julliard* had a small permanent staff, and hired more staff when necessary. *See id.* To deal with eligibility issues of individuals who were unquestionably employees, the Board said that to be eligible to vote for representation an individual had to be employed in two productions for a total of five days in the preceding year or employed for fifteen days over the prior two years. *See id.* at 155. There was, therefore, no question of when an individual was an "employee" under the Act.

The Board insists that the *Julliard* formula, which enfranchises employees who worked for fifteen days over two years, allows for the possibility that an

employee who did not work in the year before the election would be eligible to vote. Brief for the National Labor Relations Board (“NLRB Brief”) at 38. But the Board refuses to address the obvious. An individual who maintains an employee connection over two years but who only works occasionally over those two years may be seen as an employee at the end of those two years -- the *Julliard* facts. On the other hand, a person last “employed” over a year before raises more acute issues of whether he or she retains employee status.

Here the Board created a bargaining unit entirely of individuals who had not had any employment connection with WTI for over a year. Nor was there any evidence suggesting that they would ever again be “employed” by WTI. That future employment was speculative in the Board’s view should have underscored the issue of whether there were “employees” to be placed in any bargaining unit. The fact that the Board has extended employee status to a group so long absent from the workplace at least required explanation.<sup>1</sup>

## **II. The Board Disregards The Significance Of The Continuing Empty Bargaining Unit.**

Having allowed speculative employees to vote, the Board doubled down by disregarding the ongoing absence of any employees in its bargaining unit at summary judgment. (Add. 14.) The passage of time without the appearance of

---

<sup>1</sup> As a reference, striking employees lose their right to vote in an election after one year. 29 USC § 159(c)(3).

employees was deemed to present an issue already addressed by the Board in the representation case. That is, having concluded that the future emptiness of the unit was speculative, the fact that the unit continued to be empty meant nothing to the Board.

And so it goes. Year after year, the unit remains empty with no signs of change. (Add. 2, 5.) But the Board cautions the Court that it too should not speculate on the likelihood that WTI might no longer be called upon to source employees for the producers. (NLRB Brief at 42-43.) The Board misses the mark. The sourcing issue has never been speculative. The Record reflects that WTI occasionally sourced musicians for the producers as a convenience to the producers. (Add. 2, 20.) When it became clear that the BMA intended to convert that convenience into an entanglement of WTI in the producers' decisions about the use of live music and touring musicians, it is apparent that the producers found that the arrangement was no longer convenient. This point is not speculative.

### **III. The Board Disregards The BMA's Unlawful Bargaining Agenda.**

The Board's que sera, sera argument about what bargaining would look like (NLRB Brief at 26-29) requires a parlay of counterfactual assumptions.

Most obviously, the Board urges the Court to ignore the BMA's articulation of its unlawful bargaining agenda, which is to require the producers to lay off their own touring musicians and to hire local musicians represented by the BMA. JA 17-

18, 341. The Board’s suggestion that the Court should not believe what counsel told the Board (NLRB Brief at 28-29) seems desperate. The law is clear that a representation of counsel is an admission by his or her client. *E.g., Laird v. Air Carrier Engine Service, Inc.*, 263 F.2d 948, 953 (5th Cir. 1959) (when an attorney speaks formally or informally in the conduct of litigation, “he speaks for and as the client,” and the attorney’s statements are “absolutely binding”); *U.S. v. Sarwar*, 353 Fed. Appx. 347, 350 (11th Cir. 2009) (same). The fact that counsel made the same representations over and over again, and that those representations were consistent with the bargaining goals that caused the parties’ bargaining to flounder in 2007, suggests an understanding by the Board that the BMA’s bargaining goals are unlawful and cannot be squared with its order to bargain. Hence the Board tries in vain to run away from counsel’s admissions.

#### **IV. The Board Disregards The Pointlessness Of The BMA’s Bargaining Goals.**

The Board’s same refusal to accept facts explains why the Board touts the prior history of bargaining between the parties as proof that bargaining could be fruitful (NLRB Brief at 27), when in reality it shows the pointlessness of the BMA’s bargaining goals. The end of bargaining in 2007 was explained by WTI’s representative:

The Wang talked with the Boston Musicians Association, but I would have to say we reached a point where I think we felt that we could not bargain

over things we didn't control. . . . Whether there were live musicians, whether the number of musicians to be employed.

JA 30-31. There was no contrary evidence or a hint that the BMA had claimed that the break-off of negotiations was unlawful.

Given that it is undisputed that the bargaining relationship ended because WTI would not bargain over things "we didn't control," the Board's repeated insistence that history proves that WTI could productively bargain with a union that wants to bargain over the same things again is an admission that its order makes no sense.

**V. WTI's Reference To The Unlawfulness Of The Board's Certification Of A Pre-Hire Arrangement Is Not A New Argument.**

The Board also tries to avoid reality by asserting that WTI has raised a new argument by describing the Board's certification as akin to a pre-hire arrangement not sanctioned by Congress. (NLRB Brief at 40.) It is not a new argument. There is no rule that a party to a proceeding before the Board must file the same papers with a reviewing Court of Appeals that it has filed with the Board. Raising new arguments that were not made to the Board is not permitted. But WTI has said from Day 1, see JA 92-100, 11-12, that it did not employ the musicians that it sourced and that in any event it had not sourced such musicians for over a year prior to the Union's filing its representation petition. Saying that the Board's certification of a unit so composed is akin to a pre-hire agreement, and pointing out that Congress has not sanctioned such a pre-hire agreement under Section 8(f) of the Act, is not a new

argument. It is a different articulation of exactly the same arguments made to the Board. The point is properly before the Court. *See Chamberlain Group, Inc. v. One World Technologies, Inc.*, 944 F.3d 919, 925 (Fed. Cir. 2019) (clarification of prior position is not an objectionable new argument); *Dugan v. Sullivan*, 957 F.2d 1384, 1387 n.4 (7th Cir. 1992) (points raised to buttress basic arguments previously raised are not new arguments).

### CONCLUSION

Try as it might, the Board cannot dodge the uncontroverted facts that point directly at unenforceability of the Board's order. As shown in the foregoing and in WTI's main brief, the Board has missed on each of the requirements for certification. There were no employees. There was no employer. And there were no terms and conditions to bargain over. Accordingly, the Court must deny enforcement of the Board's order without remand.

Respectfully submitted,

WANG THEATRE, INC.

By its attorneys,

/s/Arthur G. Telegen

Arthur G. Telegen  
SEYFARTH SHAW LLP  
Seaport East, Suite 300  
Two Seaport Lane  
Boston, MA 02210  
(617) 946-4800

Dated: August 10, 2020

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of this brief exempted by Federal Rule of Appellate Procedure 32(f), this document contains 1929 words.

2. This brief complies with the typeface requirements of Federal Rule Appellate Procedure 32(a)(5) and the type style requirement of Federal Rule of Appellate Procedure 32(a)(6) because this brief had been prepared in proportionally spaced typefaces using Microsoft Word 2010 and is set in Times New Roman font in a size equivalent to 14 points or larger.

*/s/ Arthur G. Telegen*

Dated: August 10, 2020

### **CERTIFICATE OF SERVICE**

I hereby certify that on August 10, 2020, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I certify that the following parties or their counsel of record are registers as ECF Filers and that they will be served by the CM/ECF system: National Labor Relations Board.

/s/ Arthur G. Telegen

Dated: August 10, 2020