

Kaufman Center accompanists win union representation

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IT WAS A stunning victory. In 2002, teaching artists at the Elaine Kaufman Cultural Center voted to form a union with Local 802. We believe it was the first time in history that private, part-time community arts school teachers had ever achieved union representation. There was just one glitch: those who worked as accompanists were not included as part of the bargaining unit. It would take another 15 years for the accompanists to have their say, but last year, they filed for union representation with us as well.

The reasons the accompanists were not included in the original bargaining unit involved an extremely challenging situation created when Local 802 had to determine which employees constituted a legally appropriate group for collective bargaining purposes. Unfortunately, the teaching artists and the accompanists together did not constitute an appropriate unit for bargaining. Furthermore, when a separate petition was finally filed for the accompanists and an election was held, Local 802 had difficulty obtaining a final tally of votes due to legal obstacles placed before it by the employer. This resulted in several months

of protracted legal proceedings before the National Labor Relations Board, and it reveals just how byzantine these matters can become.

The National Labor Relations Act grants employees the right to organize and bargain, but does not grant that right to every possible group of employees. The workers who want to form a union must have something in common. In legal terms, there must be a defined "nexus" in employment terms and conditions common among employees in order for them to be entitled to the right to organize and negotiate as a single group. A large group of employees with diverse interests, job responsibilities and employment terms may not always be a legally appropriate one or even an optimal one to engage in negotiations with an employer. Thus the National Labor Relations Board has developed a basic legal standard by which the appropriateness of a union may be determined. This standard, known as the community of interest test, relies upon

multiple factors, including employees' location of employment, salary, management structure and degree of interaction among the job titles in the proposed unit. While there are often different possible groups of employees that the NLRB can approve as an appropriate bargaining unit, if employees do not possess a shared community of interest, the NLRB will not find them an appropriate unit. In that case, a union representation election will not be allowed.

In addition to considering the proper composition of a proposed bargaining unit, a union must also consider which employees in that unit will be entitled to vote. Not everyone in a proposed unit, assuming it is a proper one, may be deemed qualified to vote in a representation election. The NLRB has utilized varying standards to ascertain voter eligibility depending upon the nature of the work being performed

and the employees' length of service with the employer or the frequency with which they are employed. Fortunately, the eligibility standards developed for musicians and other performing artists are flexible ones, due to the intermittent and seasonal nature of their employment. Musicians, especially freelancers, have no assurance that they will be re-employed. To ensure that musicians have the opportunity to organize, the NLRB has developed an eligibility standard that permits performers to vote provided that they have worked for an employer at least five days over a year's time or 15 days over two years. Juilliard School. 208 NLRB 153 (1974).

The bargaining unit for the accompanists at the Kaufman Center was ultimately defined as "all regular full-time and part-time accompanist employees employed by the Employer at its facility located at 129 West 67th Street, New York, N.Y." Furthermore, the employer stipulated

that to be eligible to vote in the election, an accompanist must have performed accompanist services during the period from September 2016 to the present.

Two of the accompanists in the proposed bargaining unit were also employed as teaching artists for the Kaufman Center. (As mentioned at the top of this story, teaching artists at Kaufman already have a union contract with Local 802.) The employer challenged their eligibility to vote in the election, declaring that they were essentially teaching artists, not accompanists per se, even though they had performed accompanist services during the eligibility period. Thus, the employer requested that their ballots be discarded. Since the vote was five in favor of union representation and six against, the two challenged ballots affected the results of the election. A factual hearing was required to ascertain

whether the ballots should be opened. The employer dropped its objection to one of the accompanists, so now the fate of only one accompanist was at stake. After a hearing before a judicial hearing officer at NLRB Region 2, the officer issued a report in which she agreed that even though the challenged accompanist had satisfied the eligibility standard, she was not qualified to vote because she was not actually employed by Kaufman as an "accompanist." Local 802 challenged this determination.

On April 20, the NLRB regional director reversed the hearing officer's decision. Kaufman Center 2 RC 181017 (2017). The regional director held that the challenged accompanist was, in fact, qualified to vote because the employee had performed accompanist services during the agreed period of time. In support of her argument, the regional director cited a recent opinion issued by Acting NLRB Chairman Philip Miscimarra, in which he stated that it was the board's policy "to grant all employees included in an appropriate unit the privilege of voting in the election." Goucher College, 364 NLRB No. 71 (2016). Since the parties had specifically agreed to this unit and eligibility formula, they were contractually bound to honor it, regardless of what traditional community of interest or eligibility standards would have required.

On May 1, after months of legal wrangling, the two challenged ballots were opened. After they were included in the tally, Local 802 received a majority of votes in favor of representation. We are now awaiting an order from the NLRB certifying us as the exclusive bargaining representative for the Kaufman Center accompanists. However, there may be one more appeal before the full NLRB. We believe, based on the regional director's decision, that the appeal will not be successful and that we will prevail.

Local 802 is extremely pleased to be given the opportunity to represent these accompanists. They represent a critical component of the Kaufman Center teaching staff. We look forward to working with them as soon as possible.

**Months
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