THE TIME IS NOW

Recent decisions by the NLRB have left some cracks open for Local 802 to make some big gains for musicians.

THE TIME IS now. It is clear that the National Labor Relations Board, as currently composed, is sympathetic to labor. Several recent labor board decisions have made gains for workers. It's time for unions to take advantage of these opportunities – before they're taken away from us!

Since new NLRB administrative regulations took effect in April 2015, the time it takes to conduct a union election has decreased by 40 percent. Where it previously took five or more weeks to conduct an election, under the new rules it now takes only three weeks. Further, the employer is now required to provide the union and labor board with the names, e-mail addresses and job categories of the proposed unit several days after the petition is filed. Employers must also state and justify their position with respect to bargaining unit composition at this early point as well. If the employer's position does not impact upon a significant portion of the proposed bargaining unit, a hearing will not be required. Furthermore, the required showing of interest needed to support an election petition may now be submitted electronically. All this equates to the fact that it is now far easier for a union to succeed in winning a union representation election than it has ever been.

At Local 802, we had our first representation election in years for technical staff at the Avatar Studios, a major recording studio in New York. (See story on page 16.) We achieved a union election within three weeks of having filed for representation and won with a significant majority. On the whole, the new rules were relatively easy to navigate and we were able to achieve a stipulated election agreement very quickly. All in all, it was a rewarding and positive experience.

Another noteworthy recent labor board decision expands the population of employees that we can organize. Music students have never been organizing targets since under normal circumstances they cannot be considered employees under labor board precedent. Under the National Labor Relations Act, only employees may form unions. However, several music school programs have blurred the line between employee and student, rendering such programs fertile organizing targets. A recent NLRB Regional decision may support such organizing efforts.

In *Northwestern University v. College Athletes Players Association, 13 RC 121359 (March 26, 2014)*, Region 13 found that student athletes could organize and petition to form a union because they were in fact employed by Northwestern University. The students were paid a stipend, were bound by specific guidelines established by the university to remain eligible to remain in the program, and spent a considerable amount of time practicing and playing football. During the football season, players spent up to 50 to 60 hours a week on their athletic duties. In contrast they only spent about 20 hours a week attending classes. Considering all factors, the Regional Director found that these athletes were employees rather than students while they were engaged in athletics.

I have found similar circumstances with music programs such as one recently offered by Bard College. Within the last year, Bard has developed a program revolving around a "training orchestra" called The Orchestra Now, which Allegro wrote about in our June issue. Student musicians recruited for this program are paid a $24,000 stipend and play orchestral music in various major venues at Bard and in New York. Unfortunately, to a very large extent, this orchestra is playing jobs previously performed by the American Symphony Orchestra, which is a professional orchestra in residence at Bard. To put it bluntly, underpaid student musicians are replacing union professional musicians in the American Symphony Orchestra. Under the Northwestern University decision, a significant precedent has been established that could allow the AFM to organize the student musicians, who arguably are employees of Bard College.

It should be noted, however, that on August 17, 2015, the NLRB reversed Region 13's decision and dismissed the college football players' representation petition. But this decision was more noteworthy for what it did *not* decide than for what it did. The NLRB made no determination whether the college players were employees under the National Labor Relations Act. The board merely asserted that since the vast majority of collegiate varsity players were not unionized, it would not effectuate the policies of the NLRA to assert jurisdiction in this case. What this means to me is that a larger population of players must first be organized before the NLRB will assert jurisdiction. Since there are relatively few training orchestras that actually pay their musicians (I can only think of one other one), I do not see the same jurisdictional issues at play with The Orchestra Now. I would advocate that Orchestra Now musicians can and should be unionized the first chance we get.

The NLRB has also made a landmark decision about joint employers. Prior to

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Two recent NLRB decisions may allow student musicians in Bard College's ensemble called The Orchestra Now to form a union and be covered under a Local 802 contract.

its new ruling in *Browning-Ferris Industries*, which it just rendered on August 27, 2015, two or more employers could only be considered joint employers if they both shared **actual direct and immediate control** over the essential terms and conditions of a particular group of workers. Thus the employers would have had to jointly decide who is hired and who is fired, what the salary rates and benefits are, and how employee discipline is meted out. It is easy to see that evidence of a joint employer relationship is hard to cultivate under these criteria and that joint employers are a rarity under most circumstances.

But why do unions care about joint employers anyway? If we can prove that workers have two employers, then both employers can be held liable for labor infractions. This increases our leverage. This is particularly true when a franchise or subcontractor is involved. In these circumstances, a larger parent organization often pawns off management responsibility to a less solvent or stable organization, while they at the same time reap the benefits and profits. This has particular relevance to the fast food industry, where this practice is most prevalent. In these circumstances it is extremely difficult to demonstrate that the parent organization shares control. In fact, the parent intentionally shelters itself from these responsibilities to avoid liability. (Easy example: let's say workers at a particular McDonald's restaurant want to unionize. Who holds the real power: the local franchise owner or the national McDonald's corporation?)

Recognizing this pitfall, the NLRB revisited and revised the joint employer test to be a more realistic and pliable one. While it preserved its standard for determining what comprises an employer-employee relationship, the NLRB held that a joint employer relationship can be established if the presumed joint employers **have the ability** to share control of the employment relationship. Thus, if the **potential** exists for joint control, regardless of whether it is exercised, a joint employment relationship may be found to exist. Further, the NLRB held that potential control need not be exercised directly and immediately. It may be reduced and be limited to fiscal control.

The potential ramifications of this new standard are huge. It is a far easier standard to satisfy. Joint employer relationships can now be established under circumstances where it was previously impossible to do so.

Using Bard College's The Orchestra Now as an example again, under this new standard, it may be possible to assert that the American Symphony Orchestra and Bard College are joint employers and that the work performed by The Orchestra Now should be covered under the terms of the pre-existing contract between Local 802 and the American Symphony Orchestra. Why is this? We have already discovered a significant financial connection between the American Symphony Orchestra and Bard by examining ASO's financial statements. Further, there is an overlap of control between the two organizations since conductor Leon Botstein and ASO staff are integrally connected with The Orchestra Now. While the new NLRB decision does not provide clear criteria on what proof must be garnered to demonstrate a joint employer relationship, it can used as the foundation stone of our argument that ASO and Bard are in effect joint employers. This argument may not be sufficient to bring lost work back to ASO musicians. However, it may bring Bard to the negotiating table. We have yet to assert this position and the circumstances are quite fluid, but there is a considerable possibility that this may present itself as a test case.

The organizing potential that this new standard presents is potentially limitless. It may now be possible to organize huge number of employees by targeting parent organizations and demonstrating a joint employment relationship between them and their subordinate entities. Understandably, many businesses have had an explosive reaction to this decision. As a result there is now pending in Congress a piece of legislation deceptively named the Protecting Local Business Act (HR 345). It remains to be seen whether this proposed law has any legs. It should be closely monitored and lobbied against, lest we lose one of the most significant victories for organized labor in decades.

What does all this mean? For the first time in a very long time, organized labor has the ability to make considerable gains in density and strength. Time is too short for us to squander the opportunity that has been laid out before us. Each of us needs recognize its existence and take full advantage of it because the very future of organized labor rests in our hands.