

LOCAL 802 NEWS

Publications & Press Releases • Committee & Meeting Info
Current Organizing Campaigns • Solidarity
Contract Negotiation Updates

Publications & Press Releases

[GO TO PRESS RELEASES](#)

PUBLICATIONS

Allegro

Volume 112 No. 2

February, 2012

Yes, musicians are employees!

Labor board affirms right of freelance orchestra to form a union

by [Harvey Mars, Esq.](#)

Harvey Mars is counsel to Local 802. Legal questions from members are welcome. E-mail them to JurMars566@aol.com. Harvey Mars's previous articles in this series are archived at www.HarveyMarsAttorney.com. (Click on "Publications & Articles" from the top menu.) Nothing here or in previous articles should be construed as formal legal advice given in the context of an attorney-client relationship.

The National Labor Relations Board has just handed down welcome news to freelance orchestral musicians throughout the country.

On Dec. 27, the NLRB overturned a 2007 decision by a regional board that deemed freelance musicians employed by the Lancaster Symphony Orchestra to be independent contractors rather than employees.

The case was Lancaster Symphony Orchestra and the Greater Lancaster Federation of Musicians, Local 294 AFM (357 NLRB No. 152).

Why is this important? Under the National Labor Relations Act, only employees – not independent contractors – may form a union and engage in collective bargaining.

(There are many other advantages to being classified as an employee. See my article on the opposite page.)

In determining that these musicians are employees, the National Labor Relations Board utilized what's known as the "common law agency test." That test may include the following questions:

- Do these workers have the right to determine the means by which they do their job?
- Are these workers in a "distinct occupation"?
- Do these workers bear any economic risk if the results of their performance are poor?

- Do these workers supply their own tools (in this case, their own instruments)?

The more workers can answer "yes" to the questions above, the closer they move to being deemed independent contractors.

However, many work situations contain elements of both employee status and independent contractor status. Thus, it is up to the NLRB to divine which set of factors is pervasive. No single factor is decisive.

Freelance musicians present some elements that suggest that they are employees and other elements that suggest that they are independent contractors.

The regional decision had focused on factors that the musicians shared with independent contractors.

Like independent contractors, musicians provide their own tools.

Further, freelance musicians retain some control over their work schedule, are paid on a 1099 and are highly skilled.

Thus, the region found that these musicians were more like independent contractors than employees.

The NLRB, however, scrutinized the musicians' work environment more closely and found that the indications of being employees were far stronger.

Orchestra management retained great control over musicians by maintaining a list of guidelines that they had to abide by during rehearsals, prior to the concert, during the concert and at the end of the concert.

These guidelines required musicians to, among other things, "maintain good posture and playing position and not to talk during performance."

Orchestra management also mandated a dress code for concerts.

Additionally, orchestra management maintained control over musicians by imposing and threatening discipline upon them.

Finally and most importantly, the NLRB found that the music director maintained complete control over the manner and means by which concerts were presented.

In making the determination that the orchestra's musicians were employees, the NLRB relied heavily upon and explicitly affirmed a decision it rendered in 1985, Royal Palm Theatre, 275 NLRB 677 (1985).

In that decision, which I discuss in the article on the opposite page, the NLRB found that musicians used to make recordings for a dinner theatre were employees, not independent contractors. Musicians were under the continuous control and supervision of the music director.

The same day that the NLRB decided the Lancaster Symphony Orchestra case, the board also found that musicians employed by the Cape Cod Symphony Orchestra and the Plano Symphony Orchestra were also employees.

In fact, it seems evident that freelance musicians utilized by most symphony

orchestras in the United States are employees, since their work environment is almost identical.

There is a slogan often heard at labor rallies and other demonstrations: "Justice delayed is justice denied." In this case, more than four long years have passed since musicians in the Lancaster Symphony Orchestra first tried to form a union before they were thwarted by orchestra management.

Even though the musicians have now finally won the right to organize, it now remains to be seen whether they still have the heart and will to form a union. Hopefully, they do, and hopefully they will prevail.

[\[next article\]](#)

[\[previous article\]](#)

[\[return to search results\]](#)

[\[all publications\]](#)