Garland Symphony Orchestra Association, Las Colinas Symphony Orchestra Association and Symphony Arlington, a single employer *and* Dallas-Fort Worth Professional Musicians Association, Local 72-147, American Federation of Musicians.

Cases 16–CA–264468 and 16–CA–281162

April 30, 2026

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS PROUTY AND MAYER

On July 21, 2022, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

We affirm the judge's findings, for the reasons he stated, that the Respondent is subject to the Board's jurisdiction,[3] that the complaint allegations should not be deferred to arbitration, and that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by withdrawing recognition from the Union.[4] Further, as explained below, we also affirm the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) by modifying the master labor agreement within the meaning

[1] In the absence of exceptions, we adopt the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(5) and (1) by modifying the collective-bargaining agreement, within the meaning of Sec. 8(d), when it failed to continue in effect the terms of the collective-bargaining agreement by unilaterally adopting safety rules to reduce the spread of the Coronavirus Disease 2019 (COVID-19) and by failing and refusing to furnish the Dallas-Fort Worth Professional Musicians Association, Local 72-147, American Federation of Musicians (the Union) with the individual contracts of unit employees that were requested by the Union.

The Respondent filed bare exceptions to the judge's denial of its motion for reconsideration of his Order granting the General Counsel's motion in limine, to the judge's denial of the Respondent's motion for directed verdict, and to the judge's recommended affirmative bargaining order (other than to argue that it did not commit the violations upon which the judge relied to justify his recommended affirmative bargaining order). Because the Respondent has not presented any argument in support of these exceptions, we find, in accordance with Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations, that these exceptions should be disregarded. See, e.g., *Natural Life, Inc. d/b/a Heart and Weight Institute*, 366 NLRB No. 53, slip op. at 1 fn. 3 (2018), enfd. 827 Fed. Appx. 724 (9th Cir. 2020); *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

[2] We have amended the judge's conclusions of law consistent with our findings herein. We have also amended the remedy and modified the judge's recommended Order consistent with our legal conclusions herein, to conform to the Board's standard remedial language, and in accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), vacated in part on other grounds 102 F.4th 727 (5th Cir. 2024). We shall substitute a new notice to conform to the Order as modified.

As stated in *Performance Plumbing, LLC*, 374 NLRB No. 48, slip op. at 2 fn. 2 (2026), and *Lodi Volunteer Ambulance Rescue Squad, Inc.*, 374 NLRB No. 26, slip op. at 3 fn. 3 (2026), Chairman Murphy and Member Mayer find no need at this time to express an opinion whether the novel remedies announced by the Board majority in *Thryv* are permissible under the Act. They would be open to reconsideration of that precedent in a future proceeding, but in the absence of a three-member majority to overrule it at this time, they agree to apply *Thryv*.

In adopting the judge's recommended notice-reading remedy, we note that the Respondent, in its brief in support of its exceptions, merely argued that notice readings generally are punitive and interfere with an employer's First Amendment rights by compelling speech. Those arguments lack merit. See, e.g., *HTH Corp. v NLRB*, 823 F.3d 668, 67–678 (D.C. Cir. 2016) (finding option of having notice read by Board sufficient to address compelled-speech concern and concern that reading requirement would otherwise be overly punitive). The Respondent failed to argue in its brief in support of exceptions that the unfair labor practices committed by it in this case do not warrant a notice-reading remedy under Board precedent. To the extent that the Respondent attempts to offer additional arguments against the remedy in its reply brief to the General Counsel's answering brief, they are untimely raised, and we do not consider them. See, e.g., *Spentonbush/Red Star Cos.*, 319 NLRB 988, 989 (1995), enf. denied 106 F.3d 484 (2d Cir. 1997).

In connection with the notice-reading remedy recommended by the judge and adopted here by the Board, Member Prouty would additionally require that a copy of the attached notice be distributed to each employee present at the opening of this meeting or meetings, before the notice is read aloud by management or by the Board agent, so that employees may follow along. Such a requirement would facilitate employee comprehension of the notice and enhance the remedial objectives of the notice reading. He would make the reading aloud of the notice at a group meeting—in the employees' own language or languages, accompanied by the distribution of the notice to employees at the start of the meeting—part of the standard remedy for all unfair labor practices found by the Board. See *United Scrap Metal*, 372 NLRB No. 49, slip op. at 1 fn. 3 (2023), enfd. 116 F.4th 194 (3d Cir. 2024); *CP Anchorage Hotel 2 d/b/a Hilton Anchorage*, 371 NLRB No. 151, slip op. at 9–15 (2022) (Member Prouty, concurring), enfd. 98 F.4th 314 (D.C. Cir. 2024).

[3] We previously rejected the Respondent's arguments that the Board lacks jurisdiction in our April 4, 2022 Order denying the Respondent's motion to dismiss the complaint. In that order, we held that the complaint's jurisdictional allegations, if proven, would establish jurisdiction.

[4] The judge did not specifically address the Respondent's argument that it rebutted the Union's presumption of continued majority support by showing that the bargaining unit had no employees when the Respondent withdrew recognition during the hiatus between two orchestral seasons. We find no merit in that argument. Contrary to the Respondent, the burden was not on the General Counsel to prove that the unit musicians, who were seasonal, had a reasonable expectation of recall. Cf. *Pier 55, Inc. d/b/a Little Island*, 371 NLRB No. 80, slip op. at 1 fn. 1 (2022) (finding that employer opposing election bore burden of proving that unit consisted entirely of intermittent employees with no reasonable expectation of future employment). But in any event, the record supports a finding that employees did enjoy such an expectation: Music Director Robert Carter Austin testified that several employees had been with the

of Section 8(d) when it unilaterally altered the agreement's minimum-wage provisions and inserted an extremely broad exigent-circumstances clause. For the reasons set forth below, however, we reverse the judge's findings that the Respondent violated Section 8(a)(5) and (1) and 8(d) by unilaterally modifying the contractual provisions concerning the election of the players committee and violated Section 8(a)(5) and (1) by dealing directly with employees.

Background

The Respondent is a single employer comprised of three small symphony orchestras in the Dallas-Fort Worth area. The Respondent and the Union were parties to a master labor agreement that contained the following durational and automatic-extension language in Article 15.12:

> This Agreement shall become effective January 1, 2004 and shall continue indefinitely unless either party gives written notice to the other of termination. If no notice of termination by either party is given prior to September 1, of the current year, then the term of the Master Agreement shall automatically be extended for one full additional year, through August 31 five years hence.

In August 2017, the Respondent provided the Union with notice of its intent to terminate the agreement effective August 31, 2021.[5] The Respondent on several later occasions, including on July 1, 2020, and on June 4, 2021, reiterated to the Union its prior notice that the agreement would expire on August 31, 2021.[6] According to the testimony of Union President Stewart Williams and the Respondent's Music Director and negotiator Robert Austin, the parties mutually understood that, under the terms of Article 15.12, the Respondent's 2017 notice of intent to terminate the collective-bargaining agreement on August 31, 2021, meant that the agreement would expire on that date.[7]

The Respondent and the Union were engaged in negotiations over midterm changes to their master labor agreement in early 2020,[8] when COVID-19 began spreading throughout the United States. The ensuing government restrictions on live entertainment resulted in the cancellation of the remainder of the Respondent's 2019–2020 season and significantly affected its finances.

On June 17, the Respondent sent the Union a proposed resolution of all the outstanding issues over which the parties were bargaining. The Union replied on Friday, June 26, apologizing for the delay and saying that it would respond to the offer the following week. On Tuesday, June 30, however, the Respondent withdrew its June 17 offer. In its place, the Respondent proposed a substantially revised collection of proposals, which included, as relevant, the following: (1) an exigent-circumstances clause giving the Respondent unlimited, unreviewable discretion to determine the existence of and response to emergencies, subject only to effects bargaining; (2) provisions related to the election of the players committee (i.e., the Union's on-site representative);[9] and (3) cuts to the minimum pay rates for the 2020–2021 season. The Union rejected the aforementioned proposals on July 20, offering a counterproposal on pay.[10] The Respondent replied on July 24, stating that the parties were at impasse and that it would implement its last, best, and final offer, which contained the above provisions, on July 31. The Union responded on July 30, agreeing to some additional changes and offering counterproposals. It added that the Respondent had no right to implement the above-mentioned proposals without the Union's consent and that it expected that any individual contracts that the Respondent sent to employees would be consistent with the terms of the master agreement, which remained in effect.[11] On July 31, over the Union's objection, the Respondent implemented its proposals and sent out individual contracts, at least some of which reflected the reduced wage rates for the 2020–2021 season included in its final offer.

A 2008 side letter to the master agreement authorized the Respondent to grant musicians' requests to be released for some or all of a season.[12] In mid-August, Sonja

Respondent for 30 years, and the master labor agreement contains provisions that presume substantial continuity in the orchestras' composition, e.g., Art. 9.2A ("By April 30 of each year, the Music Director will confer with each of the principal players for the purpose of soliciting advice concerning possible personnel openings for the following season."). In short, the hiatus between orchestral seasons did not extinguish the parties' bargaining relationship.

[5] Tr. 14–15, 59.

[6] GC Exhs. 10, 11, and 26. No party asserts that the Respondent or the Union ever provided notice to the other of an intent to have the collective-bargaining agreement terminate *before* August 31, 2021. Further, the complaint alleged, and the Respondent admitted in its answer, that the collective-bargaining agreement "was in effect from January 1, 2004 through August 31, 2021." Answer at para. 9(a).

[7] Tr. 58–59; 291–292; see also R. Br. at 31–32 & fn. 27; GC Ans. Br. at 10–11.

[8] From this point on, all dates are in 2020 unless otherwise noted.

[9] The master agreement provided for a seven-member committee elected by the Respondent's musicians. The Respondent's proposal added requirements that elections occur annually during the first rehearsal of the season and that the committee be composed of current employees only.

[10] The Union expressed its willingness to accept other proposals, not relevant here, made by the Respondent.

[11] As provided for in the master agreement, the Respondent entered into individual contracts with musicians for each season. The agreement permitted musicians to negotiate wages above the contractual minimums, but specified that the master agreement controlled in the event of a conflict with an individual contract.

[12] The 2008 side letter states, in pertinent part:

Ryberg, a violist who had previously accepted the Respondent's offer to play in the 2020–2021 season, contacted Music Director Austin to express her concerns about performing during COVID-19 pandemic. Austin replied that if Ryberg had concerns about COVID exposure, she could opt out of the upcoming season, but that she would only have until August 31 to decide. Ryberg ultimately decided to request a release from her contract, and the Respondent granted it.

Discussion

I. THE MIDTERM-MODIFICATION ALLEGATION

Section 8(a)(5) of the National Labor Relations Act requires parties to bargain in good faith, upon request, regarding wages, hours, and other terms and conditions of employment, provided that they are not required to discuss or agree to any modification of the terms and conditions of a "currently effective agreement."[13] It also requires an employer to provide the union with notice and an opportunity for bargaining before implementing a change to a mandatory subject of bargaining.[14] Section 8(d) of the Act defines the duty to bargain and sets forth certain conditions that must be satisfied before parties may terminate or modify a collective-bargaining agreement.[15] Together, Section 8(a)(5) and Section 8(d) of the Act prohibit an employer from modifying terms and conditions of employment established by a collective-bargaining agreement during the agreement's term without the union's consent. See, e.g., *Knollwood Country Club*, 365 NLRB 404, 405–406 (2017); *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1063–1064 (1973), enfd. mem. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975).

Here, the judge concluded that the parties' master agreement was in effect on July 31, 2020, when the Respondent modified the master agreement over the Union's objection. The judge reasoned that "absent written notice of termination" the master agreement "r[an] for 1-year terms, which begin on September 1 and end on August 31," and there was no evidence "showing written termination before the [agreement]'s September 1, 2019 renewal date." The judge then rejected the Respondent's claim that Article 15.14 constituted a reopener provision that would have allowed the Respondent to implement changes to the agreement mid-term after bargaining to impasse.[16] He

1. All release requests shall be made . . . with 21 days advance written notice and shall be answered in writing within 48 hours of receipt of the request.

2. A contracted musician may request release from some or all of the services in his or her contract. The [Respondent] may, at its sole discretion, grant the requested release. If the [Respondent] does not grant the requested release, the musician must perform the services that were contracted . . . .

[13] See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (regarding mandatory subjects, the employer and union upon request have an "obligation . . . to bargain with each other in good faith," although "neither party is legally obligated to yield").

[14] *NLRB v. Katz*, 369 U.S. 736 (1962).

[15] Sec. 8(d) of the Act provides:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
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> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
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> (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:
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> The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

Id. § 158(d).

[16] Art. 15.14 provides as follows: "Promise to Bargain. The parties to this Master Agreement are required to meet and bargain in good faith upon receipt of written notice dated at least ninety (90) days prior to the

therefore concluded that the Respondent violated Section 8(a)(5) and (1), within the meaning of Section 8(d), by modifying the agreement, mid-term, without the Union's consent.

On exception, the Respondent argues that Section 8(d)'s prohibition on midterm modifications is inapplicable. First, the Respondent repeats its argument that Article 15.14 allowed it to reopen negotiations on subjects covered by the master agreement and to make midterm changes after bargaining to impasse. We reject that argument for the reasons given by the judge.[17] Second, the Respondent argues that Section 8(d)'s prohibition of midterm modifications does not apply because the master agreement was "of indefinite duration." In support of that view, it relies on the clause in Section 8(d) providing that "the duties so imposed [by Section 8(d)] shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." The Respondent asserts that the midterm modifications implemented by the Respondent were lawful because the master agreement was not a "contract for a fixed period" within the meaning of Section 8(d). We find that argument to be unpersuasive.[18]

First, the Respondent cites no precedent to support its view that Section 8(d)'s general prohibition against midterm modifications absent mutual consent is inapplicable if the contract is not of fixed duration. That interpretation of Section 8(d), in turn, is contrary to its plain text. The portion of Section 8(d) cited by the Respondent clearly permits an employer or union to *refuse to negotiate* over the other party's proposed midterm modifications to a fixed-term agreement; a party may stand pat on the contract. See, e.g., *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680, 683–684 (2d Cir. 1952) (Sec. 8(d) relieves a party from the continuous duty to bargain over terms and conditions of employment contained in an existing collective-bargaining agreement). But nothing in any part of Section 8(d) authorizes a party to affirmatively modify, without mutual consent, any provision of any collective-bargaining agreement (whether indefinite or fixed-term) when, as here, that agreement remains in effect.[19] To the contrary, Section 8(d) addresses midterm modifications by prohibiting them absent mutual consent. In other words, Section 8(d) relieves both parties of any *duty to bargain* over another party's proposed midterm modifications to a fixed-term agreement, while at the same time prohibiting any party from *implementing* midterm modifications to any agreement absent mutual consent.[20]

Second, our holding that the Respondent was not free to modify the master agreement on July 31, 2020, absent the Union's consent, is consistent with the policies of the Act. The Supreme Court has directed that, in interpreting Section 8(d), the Board is to be mindful of "a 'dual purpose' in the Taft-Hartley Act—to substitute collective bargaining for economic warfare and to protect the right of employees to engage in concerted activities for their own benefit." *NLRB v. Lion Oil Co.*, 352 U.S. 282, 289 (1957) (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 284 (1956)); see also *Allied Chemical & Alkali Workers,*

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conclusion of any season." In rejecting the Respondent's argument, the judge relied in part on Art. 15.7 (Amendments), which provides that "No additions, waivers, deletions, or amendments to this Master Agreement shall be made *except by mutual consent* in writing of both parties." (Emphasis added.) The judge explained that, in light of Art. 15.7, Art. 15.14 did not constitute a reopener that would permit the Respondent to implement upon impasse while the master agreement remained in effect.

[17] On exception, the Respondent also suggests that Art. 15.8 is a second reopener clause which authorized its unilateral modification of the contract. It is not. Art. 15.8 provides:

> Questions Not Covered by this Master Agreement. In the event a question arises which is not covered by the provisions of this Master Agreement, the parties involved resolve to undertake earnest negotiation for a reasonable and mutually agreement settlement.

Art. 15.8 addresses subjects not covered by the master agreement. It does not address covered matters, such as wages or force majeure. And it certainly does not authorize a party to modify covered terms without the other party's consent while the master agreement remains in effect. Further, Art. 15.8 cannot be read to permit midterm implementation upon impasse in light of Art. 7's requirement that no amendments shall be made "except by mutual consent."

[18] Chairman Murphy finds that the parties' collective-bargaining agreement was, by mutual agreement reached in 2017, a contract of definite duration that was set to expire on a date certain: August 31, 2021. Accordingly, he concludes that the Respondent violated Sec. 8(a)(5) and (1) within the meaning of Sec. 8(d) by modifying the contract on July 31, 2021, without the Union's consent. He therefore finds it unnecessary to join his colleagues' finding that the Respondent violated Sec. 8(a)(5) and (1) within the meaning of Sec. 8(d) even if the collective-bargaining agreement was one of indefinite duration. He likewise finds it unnecessary to join his colleagues' further finding that, even assuming that the Respondent could lawfully modify the terms of the collective-bargaining agreement after bargaining to impasse, the Respondent would have nevertheless implemented unilateral changes in violation of Sec. 8(a)(5) and (1).

[19] As referenced in footnotes 6 and 7 (and accompanying text), above, it is undisputed that the master agreement, by operation of Art. 15.12's automatic-extension clause, remained in effect through August 31, 2021. We need not and do not decide precisely how the parties' automatic-extension clause operates. Rather, we accept the parties' mutual understanding that it served to automatically extend the agreement through August 31, 2021. See *Restatement (Second) of Contracts* § 201(1) (1981) ("Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.").

[20] Accordingly, the fact that the General Counsel alleged, and the Respondent admitted, that the parties' agreement was "of indefinite duration" is not determinative of whether the Respondent violated the Act by unilaterally modifying the master agreement.

Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 187 (1971) (explaining that Section 8(d) "'seeks to bring about the termination and modification of collective-bargaining agreements without interrupting the flow of commerce or the production of goods'" caused by economic warfare) (quoting *Mastro Plastics*, 350 U.S. at 284). "A construction which serves neither of these aims is to be avoided unless the words Congress has chosen clearly compel it." *Lion Oil Co.*, 352 U.S. at 289.[21]

Here, interpreting Section 8(d) to permit the Respondent to modify the master agreement in July 2020 without the Union's consent would neither substitute collective bargaining for economic warfare nor protect the right of employees to engage in concerted activities for their own benefit. It was collective bargaining that produced the master agreement, including its terms on wages, force majeure, and automatic extension. When the Respondent modified that agreement, over the Union's objection, at a time when the agreement remained in force, the Respondent substituted unilateral action for the process of collective bargaining that the Act is designed to promote. And the Respondent's unilateral action certainly had no tendency to protect employees' rights to benefit themselves through concerted activities. In sum, contrary to the position advanced by the Respondent, our finding that the Respondent unlawfully modified the master agreement promotes the Act's policies of encouraging collective bargaining and avoiding industrial strife.[22]

II. THE PLAYERS-COMMITTEE ALLEGATION

Although the complaint alleged that the Respondent violated Section 8(a)(5) and (1) by conditioning bargaining on its players-committee proposal, the judge found that the Respondent unlawfully modified the master agreement in violation of Section 8(a)(5) and (1) and 8(d) by unilaterally imposing the proposal. In the course of doing so, the judge observed that "the composition of the Players Committee and its related selection procedures are nonmandatory subjects of bargaining."

The judge's observation was correct. See, e.g., *Missouri Portland Cement*, above, 284 NLRB at 434 fn. 13 (employer's proposal limiting eligibility for appointment to grievance and health-and-safety committees to current employees concerned a nonmandatory subject). But because the provision concerned a nonmandatory subject, it necessarily follows that the Respondent did not violate Section 8(d) by modifying the provision, as the Supreme Court has held that "a 'modification' is a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining."

[21] Accord *Jacobs Mfg. Co.*, 196 F.2d at 684 (the exception to the duty to bargain for terms and conditions contained in a contract "necessarily conflicts with the general purpose of the Act, which is to require employers to bargain as to employee demands whenever made to the end that industrial disputes may be resolved peacefully without resort to drastic measures likely to have an injurious effect upon commerce, and the general purpose should be given effect to the extent there is no contrary provision.").

Although the collective-bargaining agreement in *Lion Oil* "was to remain in effect until October 23, 1951, and was to continue in force thereafter for *an indefinite period*," *Lion Oil Co.*, 109 NLRB 680, 680 (1954) (emphasis added), enf. denied 221 F.2d 231 (8th Cir. 1955), revd. 352 U.S. 282, the Supreme Court concluded "[t]he situation here is not different, so far as the applicability of the [Act] is concerned, from that of a fixed-term contract with a clause providing for reopening at some specific time." 352 U.S. at 293.

[22] Finally, even if we were to accept the Respondent's premise that it could lawfully modify the terms of the master agreement after bargaining to impasse, we note that the Respondent would have nevertheless implemented unilateral changes in violation of Sec. 8(a)(5) and (1). In this regard, any impasse reached by the parties would not have been a valid, good-faith impasse.

First, the Respondent would have been unlawfully insisting to impasse over an exigent-circumstances clause permitting the Respondent to modify the agreement whenever it wished. See *Altura Communication Solutions, LLC*, 369 NLRB No. 85, slip op. at 2 fn. 4, 3–4 (2020) (and cases cited therein) (finding that employer proposals giving it unilateral control over virtually all significant terms and conditions of employment precluded good-faith impasse), enfd. 848 Fed. Appx. 344 (9th Cir. 2021). Second, the Respondent would have been unlawfully insisting to impasse over the selection of the players committee, the Union's on-site representative, a nonmandatory subject of bargaining. See *Missouri Portland Cement Co.*, 284 NLRB 432, 433 fn. 5, 434 fn. 13 (1988) (finding employer unlawfully insisted to impasse over union's selection of its bargaining representatives). Third, the parties could not have been at impasse because, the day before the Respondent unilaterally implemented its last, best, and final offer, the Union presented significant counterproposals and expressed to the Respondent its willingness to bargain further. See *Grinnell Fire Protection Systems Co.*, 328 NLRB 585, 585 (1999) (employer unlawfully declared impasse despite union's stated willingness to compromise), enfd. 236 F.3d 187 (4th Cir. 2000), cert. denied 534 U.S. 818 (2001).

Further, the Respondent has not shown that either of the two limited defenses that permit unilateral action in the absence of an overall impasse in bargaining apply here: an economic exigency or a union delay in bargaining. And these defenses are inconsistent with the Respondent's claim that it bargained to impasse before engaging in unilateral action. See, e.g., *Mackie Automotive Systems*, 336 NLRB 347, 349 (2001). Of course, as the judge recognized, even if there were an economic exigency, the Respondent still could not have instituted midterm modifications to the master agreement. See *Oak Cliff-Golman Baking*, above, 207 NLRB at 1064.

Allied Chemical & Alkali Workers, above, 404 U.S. at 185.[23] We therefore reverse the judge.[24]

III. THE DIRECT-DEALING ALLEGATION

The judge found a direct-dealing violation that differed in significant respects from the violation alleged in the complaint. Specifically, the complaint alleged that, from about August 11 through 20, the Respondent "bypassed the [Union] and dealt directly with its employees in the Unit by communicating directly with employees regarding their ability to opt out of performances based on concerns related to COVID or to rescind their signed employment contracts." The Respondent and General Counsel focused narrowly on that complaint allegation in their posthearing briefs to the judge. The General Counsel argued to the judge that the Respondent engaged in unlawful direct dealing by communicating directly with violist Ryberg about her ability to opt out of performing due to her concerns about COVID exposure rather than consulting with the Union. The Respondent defended its actions based primarily on the 2008 side letter, which authorized unit employees to request, and the Respondent to grant, a release from an individual employment contract.[25] Instead of resolving the issue alleged in the complaint and litigated by the parties, the judge found that the Respondent engaged in unlawful direct dealing by sending employees individual contracts with wage rates below the minimums specified in the master agreement.

On exception, the Respondent argues that the judge deprived it of its right to due process. We agree. The Board may find a violation not alleged in the complaint only if the issue is closely connected to the subject matter of the complaint and has been fully and fairly litigated. *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). Here, the unalleged violation found by the judge was not closely related to the complaint allegation, in that they were based on different communications, exchanged on different dates, involving different individuals and different subjects. And even assuming they were closely related, the unalleged violation was not fully and fairly litigated. None of the parties briefed the issue of whether sending musicians individual employment contracts with compensation lower than the minimum required by the master agreement amounted to unlawful direct dealing. Further, in defending against the complaint allegation, the Respondent largely relied on a contractual provision that was irrelevant to the violation found by the judge. See *Dilling Mechanical Contractors, Inc.*, 348 NLRB 98, 106 (2006) (finding issue was not fully and fairly litigated where no party addressed issue in posthearing brief because it suggested that the General Counsel was not attempting to raise a claim of unlawful conduct and respondents were not on notice that the specific conduct in dispute was at issue). We therefore reverse the judge.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 5:

"By unilaterally changing wages and by unilaterally creating an exigent-circumstances provision, without the Union's consent, the Symphonies modified the parties' collective-bargaining agreement in violation of Section 8(a)(5) and (1) and 8(d) of the Act."

Delete Conclusion of Law 6 and renumber the subsequent paragraphs accordingly.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order the Respondent to cease and desist from engaging in such conduct and to take certain steps to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) by modifying the master labor agreement in effect through August 31, 2021, when it failed to adhere to the agreement's wage provisions and added the exigent-circumstances clause, we shall order the Respondent to rescind the unlawful modifications and make whole the affected employees for any loss of earnings and other benefits attributable to its unlawful modifications of the agreement. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), the Respondent shall also compensate these employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful contract modifications. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in

[23] That the Respondent did not commit an unfair labor practice by altering the master-agreement provisions related to the players committee does not mean that the Respondent could effectuate its unilaterally imposed provision by refusing to recognize committee members whose selection or membership contravened the provision. Indeed, that is exactly what occurred in *Missouri Portland Cement*, above, where the Board found that the employer violated Sec. 8(a)(5) and (1) by refusing to recognize the union's chosen representatives.

[24] Because we reverse the judge on substantive grounds, it is unnecessary to reach the Respondent's argument that the judge deprived it of its right to due process by finding an unalleged violation.

[25] The Union's posthearing brief did not address the direct-dealing allegation.

New Horizons, above, compounded daily as prescribed in *Kentucky River Medical Center*, above.

In addition, we shall order the Respondent to compensate the affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s) for each employee. *AdvoServ of New Jersey, Inc*., 363 NLRB 1324 (2016). Further, we shall order the Respondent to file with the Regional Director for Region 16 a copy of the affected employees' corresponding W-2 forms reflecting the backpay awards.

Having found that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union, we adopt the judge's recommendation that the Respondent must recognize and, upon request, bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate bargaining unit and embody any understanding reached in a signed agreement.[26] We shall also order the Respondent to rescind any unilateral changes made after the unlawful withdrawal of recognition. To the extent such changes have included ceasing contributions to the American Federation of Musicians and Employers' Pension Fund, the Respondent shall make any delinquent contributions to the fund, including any additional amounts due to the fund on behalf of unit employees in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). Further, in accordance with our decision in *Thryv*, above, the Respondent shall also compensate affected employees for any other direct or foreseeable pecuniary harms incurred as a result of any failure to make pension contributions. Moreover, the Respondent shall be required to reimburse affected employees for any expenses ensuing from any failure to make the required pension contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981).[27] Such amounts should be computed in the manner set forth in *Ogle Protection Service*, above, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above.

ORDER

The National Labor Relations Board orders that the Respondent, Garland Symphony Orchestra Association, Las Colinas Symphony Orchestra Association, and Symphony Arlington, a Single Employer, Garland, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from the Dallas-Fort Worth Professional Musicians Association, Local 72–147, American Federation of Musicians (the Union) and failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of unit employees.

(b) Making midterm modifications to the master labor agreement with the Union without the Union's consent, including by unilaterally changing wages and creating an exigent-circumstances clause.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> Included: All musicians.
>
> Excluded: Confidential and professional employees, guards, and supervisors as defined by the National Labor Relations Act.

(b) Adhere to the mandatory terms and conditions set out in the master labor agreement as they existed prior to July 31, 2020, and continue those terms and conditions in effect unless and until changed through collective bargaining with the Union.

(c) Make affected employees whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of the Respondent's unlawful actions, in the manner set forth in the amended remedy section of this decision.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay

[26] Although the Respondent filed a bare exception to the judge's recommended affirmative bargaining order, it failed to argue that such a remedy is improper, even assuming the Board affirms the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by withdrawing recognition from the Union. We therefore find it unnecessary to provide a specific justification for that remedy. *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007); *Heritage Container, Inc.*, 334 NLRB 455, 455 fn. 4 (2001). See also *Scepter v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002) (finding that "a generalized exception to a remedial order is insufficiently specific to preserve a particular objection for appeal" so that, in the absence of particular exceptions, the Board may issue an affirmative bargaining order without specifically stating the basis for such).

[27] To the extent that an employee has made personal contributions to the fund that were accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

award, and file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

(e) Make all contractually required contributions to the American Federation of Musicians and Employers' Pension Fund that the Respondent has failed to make since August 31, 2021, if any, including any additional amounts due the funds, in the manner set forth in the amended remedy section of this decision.

(f) File with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Garland, Irving, and Arlington, Texas facilities copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 31, 2020.

(i) Hold a meeting or meetings during working hours, scheduled to ensure the widest possible attendance of employees, at which the attached notice will be read to the employees by Music Director Robert Carter Austin (or, if he is no longer employed by the Respondent, by an equally high-ranking responsible management official of the Respondent) in the presence of a Board agent and, if the Union so desires, a union representative, or, at the Respondent's option, by a Board agent in the presence of Austin (or, if Austin is no longer employed by the Respondent, an equally high-ranking responsible management official of the Respondent) and, if the Union so desires, a union representative.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 30, 2026

_____
James R. Murphy, Chairman

_____
David M. Prouty, Member

_____
Scott A. Mayer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in each notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT withdraw recognition from the Dallas-Fort Worth Professional Musicians Association, Local 72-147, American Federation of Musicians (the Union) and fail and refuse to bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT make midterm modifications to our master labor agreement with the Union without the Union's consent, including by unilaterally changing wages and creating an exigent-circumstances clause.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Included: All musicians.

Excluded: Confidential and professional employees, guards, and supervisors as defined by the National Labor Relations Act.

WE WILL adhere to the mandatory terms and conditions set out in the master labor agreement as they existed prior to July 31, 2020, and continue those terms and conditions in effect unless and until changed through collective bargaining with the Union.

WE WILL make you whole for any loss of earnings and other benefits resulting from our unlawful actions, plus interest, and WE WILL also make you whole for any other direct or foreseeable pecuniary harms suffered as a result of our unlawful actions, plus interest.

WE WILL compensate you for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL make all contractually required contributions to the American Federation of Musicians and Employers' Pension Fund that we failed to make since August 31, 2021, if any, including any additional amounts due the fund.

WE WILL file the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, copies of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

GARLAND SYMPHONY ORCHESTRA ASSOCIATION, LAS COLINAS SYMPHONY ORCHESTRA ASSOCIATION AND SYMPHONY ARLINGTON

The Board's decision can be found at https://www.nlrb.gov/case/16-CA-264468 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Bryan Dooley, Esq., for the General Counsel.
David Watsky, Esq. (Lyon, Gorsky & Gilbert, L.L.P.), for the Charging Party.
Dan Hartsfield, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This hearing was held in March 2022. The complaint alleged that the Garland Symphony Orchestra Association, Las Colinas Symphony Association and Symphony Arlington operated as a single employer (collectively called the Respondent or the Symphonies). It further alleged that the Symphonies violated the National Labor Relations Act (the Act) by, inter alia: engaging in direct dealing with unionized employees represented by the Dallas Fort-Worth Professional Musicians Association, Local 72–147, American Federation of Musicians (the Union); failing and refusing to provide relevant information to the Union; making mid-term changes to the parties' collective-bargaining agreement without the Union's consent; and withdrawing its recognition of the Union as the exclusive collective-bargaining representative of its musicians.

As will be discussed below, the majority of these allegations have merit. On the record, I make the following

FINDINGS OF FACT[1]

I. SINGLE EMPLOYER STATUS

The parties stipulated and the record establishes that the Symphonies are a single employer. (Tr. 215.) The Board finds single employer status, when separate business entities function as a single integrated enterprise. *Radio Union v. Broadcast Service of Mobile*, 380 U.S. 255 (1965). Four factors are determinative:[2] (1) common ownership or financial control; (2) interrelation of operations; (3) common labor relations control; and (4) common management. *Bolivar-Tees, Inc.*, 349 NLRB 720 (2007). The Symphonies are jointly controlled and commonly managed by Music Director Robert Carter Austin and Executive Director Mark Hughes. Its musicians are covered by the same collective-bargaining agreement, which was negotiated by Austin. On these bases, as well as the stipulation, it is a single employer.

II. JURISDICTION

The Board has jurisdiction over this matter. A brief review of its precedent regarding symphony orchestras is useful.

1. Standards for Symphony Orchestras

"The Board exercises jurisdiction over symphony orchestras which have a gross annual revenue from all sources (excluding only contributions which are because of limitations by the grantor not available for use for operating expenses) of not less than $1 million. Rules §103.2; see also 38 Fed. Reg. 6176 (Mar. 7, 1973)." *National Labor Relations Board, An Outline of Law and Procedure in Representation Cases,* p. 16 (June 2017). See, e.g., *Musical Arts Association*, 356 NLRB 1470 (2011) (jurisdiction where symphony had over $1 million in gross annual revenues and over $5000 in out-of-state purchases); *Colorado Symphony*, 366 NLRB No. 122 (2018); *Lancaster Symphony*, 358 NLRB No. 104 (2012) (not reported in Board volumes).

2. Synthesis

The complaint pled that the Board has jurisdiction over the Symphonies because it exceeded $1 million in gross revenues "during the calendar year ending 2019 [CY 2019]." The Symphonies contend, however, that CY 2019 is inappropriate and that either fiscal year (FY) 2019–2020 or FY 2020–2021 are valid benchmark periods. It adds that, during those periods, it did not have $1 million in gross revenues and that jurisdiction is, thus, lacking. Its position is incorrect; CY 2019 is a valid benchmark.

CY 2019 is appropriate for the jurisdictional calculation. *First*, CY 2019 was the Symphonies' last *full year of pre-COVID-19 normalcy* before the pandemic temporarily routed its operations and revenues. (Jt. Exhs. 3–7, 9–16.) It seems logical to use a normal year to gauge jurisdiction rather than the aberrational periods suggested by the Symphonies. *Second*, in finding jurisdiction, the Board has upheld using business data from the last full calendar year before the alleged ULPs occurred, which is CY 2019.[3] *Acme Equipment Co.*, 102 NLRB 153 (1953). In sum, in CY 2019, the Symphonies met the Board's jurisdictional standards (i.e., $1 million+ in gross revenues[4] and $5000+ in de minimis interstate commerce).[5]

In conclusion, the Symphonies engage in commerce under §2(2), (6), and (7) of the Act. The Union is a §2(5) labor organization.[6] The Board, as a result, has jurisdiction herein.

III. UNFAIR LABOR PRACTICES

A. Record Evidence

1. Introduction

The Symphonies' concert season runs from September to August. The parties have had a collective-bargaining relationship since 1991, which began when the Symphonies voluntarily recognized the Union as the exclusive representative of its musicians (the Unit). Union President Stewart Williams services the Unit; he handles grievances, bargaining and other matters.

The parties most recent contract was signed almost 20 years ago on August 24, 2004 (the CBA). (GC Exh. 2). The CBA contains an automatic renewal provision, which continuously extends the CBA for 1-year periods, absent written termination by either party. In practice, the parties have generally not terminated the CBA and have not held full, post-expiration contract bargaining. They have, instead, allowed the CBA to continuously automatically renew and periodically addressed any workplace issues by negotiating mid-term changes to the existing CBA. This practice has resulted in the parties periodically agreeing to amend the CBA's wage scale, while leaving its other provisions unchanged.

2. Relevant CBA Portions

A brief review of the CBA is helpful, inasmuch as several clauses aid the disposition of this matter.

a. Duration and Automatic Renewal

As noted, the CBA had an automatic renewal provision, which states as follows:

> 15.12 Term of the Master Agreement. This Agreement shall … continue indefinitely unless either party gives written notice to the other of termination. If no notice of termination by either party is given prior to September 1 of the current year, then the term of the Master Agreement shall automatically be extended for one full additional year through August 31 ….

(GC Exh. 2 at 16).

b. Promise to Bargain and Amendments

The CBA memorialized the parties' mutual bargaining

[1] Most of the relevant facts in this case are undisputed. Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence.

[2] The single employer test does not mandate the simultaneous presence of all four factors. *Bolivar Tees,* supra.

[3] The ULPs at issue began in 2020.

[4] The Symphonies' counsel conceded gross revenues of $1.1-million in CY 2019. (GC Exh. 31 at 2–3.)

[5] It purchased goods and services totaling over $9000 in CY 2019 from these out-of-state vendors: Squarespace (NY); Norton Antivirus (CA); Ema Emma (TN); Yelp (CA); Peters Oxford (NY); Lucks Music (MI); One-Hour Translation (DC); At-Home Prep (TN); Beckman (OH); and Euro Amer. Music (NY). (GC Exh. 30.)

[6] This was admitted in the Symphonies' Answer. (GC Exh. 1.)

obligation:

> 15.14 Promise to Bargain. The parties … are required to meet and bargain in good faith upon receipt of written notice dated at least ninety (90) days prior to the conclusion of any season.

(Id.) It expressly stated, however, that mid-term changes require joint consent:

> l5.7 Amendments. No additions … or amendments to this Master Agreement shall be made except by mutual consent in writing of both parties. Any additions … or amendments … shall supersede any such previous agreement ….

(Id.)(emphasis added).

c. Players' Committee

The CBA created a Players' Committee, which represented the Union and musicians:

> 5. COMMITTEES ….
>
> 5.2A. The Players Committee shall be comprised of seven (7) members elected by the musicians ….
>
> 5.2B. …. [T]he Players Committee shall be the official representative of the Union at the job site …. [and] the official representative … of the musicians ….

(GC Exh. at 1–2.) Union President Williams likened them to shop stewards.

d. Compensation

Regarding wages, the CBA provided that:

> 7. COMPENSATION.
>
> 7.1 Amounts Paid …. The Association shall pay at least the amounts provided for in Exhibit l annexed hereto.
>
> 7.1 A. Each musician shall have the right to negotiate with the Association for higher compensation than that provided for in Exhibit 1.

(GC Exh. 2 at 4.) As noted, the parties have periodically agreed to raise musician wages, without reopening the entire agreement for renegotiation.

e. Force Majeure

Regarding extraordinary events, the CBA provides that:

> 15.11. Force Majeure. In the event it becomes impossible to continue … [due to] fire, flood, … war, … or … [governmental] rules … [,] the Association … [can] cancel services without compensation for the duration of the emergency ….

(GC Exh. 2.)

f. Management Rights

As would be expected, the CBA contains a general management rights provision:

> 2. MANAGEMENT RIGHTS
>
> 2.1 General Provisions. Except to the extent expressly abridged by a specific provision of this Agreement, the Association reserves and retains, solely and exclusively all of the inherent and customary rights to manage all business and artistic affairs of the orchestra, including but not limited to the right to establish and enforce reasonable rules and regulations, the right to maintain efficiency and the right to maintain discipline.
>
> 2.1 A. It is agreed that the Association shall have the sole authority to determine the number of musicians engaged and to determine and direct the policies, modes, and methods of operating the business, subject only to any limitation contained in the specific provisions of this Agreement.

(Id.)

g. Individual Contracts

The Symphonies send contracts to its musicians before each season's start, which memorialize their pay, commitment and other matters. The CBA states as follows:

> 8. INDIVIDUAL CONTRACTS
>
> 8.1 In the event of a conflict between an Individual Contract and the Master Agreement, the Master Agreement will prevail ….
>
> 8.5 The Association shall not be required to supply a copy of each Individual Contract to the Union, but the President of the Union and/or the Union's legal counsel may review the Individual Contracts in the Association's office.
>
> 8.6 Individual contracts for the following season will be sent to the contracted musicians by June 1 and must be returned by August 30.

(Id.).

3. Early 2020—COVID-19 Severely Impacts the Symphonies[7]

On January 31, the United States announced that COVID-19 was causing a "public health emergency." (Jt. Exh. 3.) On March 13, Texas declared "a state of disaster." (Jt. Exh. 7, 9–16.) On March 16, Music Director Austin informed his musicians that:

> [T]he Irving Arts Center … [was] closing for eight weeks …. [T]he Arlington Music Hall … [was cancelling] all events …. The Garland City Council is having an emergency meeting …

[7] All dates that follow are in 2020, unless otherwise stated.

and [is] … likely … [to] follow suit.

(Jt. Exh. 8.).His letter described COVID-19 as an "Article 15.11 (Force Majeure)," which meant that musicians would not be paid for cancelled performances.[8] (Id.). COVID-19, thereafter, resulted in multiple cancelled concerts and a severe revenue loss. This unexpected fiscal crisis prompted the Symphonies to request mid-term negotiations with the Union, which sought wage and other concessions.

4. Mid-Term Discussions to Modify the CBA

Their discussions were memorialized by a series of emails and letters, which are detailed below. It is noteworthy that, at this point, the CBA had automatically renewed for the September 1, 2019, to August 31, 2020 period (i.e., the 2019–2020 CBA was in place).[9] Their talks must, as a result, be characterized as invitations by the parties to make mid-term changes to the 2019–2020 CBA, which required mutual consent under current Board precedent.

a. June 17—Symphonies' Proposed Mid-Term Modifications

Symphonies' attorney Hartsfield emailed the Union and attached a red-lined CBA outlining his proposed mid-term changes. The email summarized his position as follows:

- Wage freeze … (see Exhibit 1);
- Release Policy for Principal Musicians … (see Art. 8.7)
- No further renegotiation … through 8/31/21 (see new Art. 15.15) ….
- Final Agreement subject to ratification of the players ….

> It does not contain a compensation proposal for 2020-21. Given the uncertainty of the upcoming season …, I am proposing that we [re]turn to … the unique challenges of the 2020-21 season after we put … the collateral issues to rest ….

(GC Exhs. 5–6.)

b. June 26—Union Reply

Union Attorney Watsky replied that he would respond within the week. (GC Exh. 7). This neutral reply apparently agitated the Symphonies and triggered the withdrawal of its last proposal. It was, at this point, that the Symphonies' approach abruptly changed from a cooperative to adversarial posture.

c. Jun e 30—Symphonies' Reply

Hartsfield withdrew the Symphonies' offer and stated that:

> The global settlement proposal … provided … on June 17 … is withdrawn ….
>
> For the 2020-21 season, I have enclosed the Company's proposal for operating during the current pandemic. The COVID-19 pandemic is a "force majeure" under the Master Agreement and an extraordinary event beyond the Symphony's control that has created exigent economic circumstances compelling prompt action in advance of the 2020-21 season. See, e.g., *Peerless Publications*, 283 NLRB 334 (1987); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991); *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995) …. The proposal is also presented pursuant to Articles 15.8 ("questions not covered"), 15.11 ("force majeure"), and 15.14 ("promise to bargain") and represents the continuation of bargaining that has occurred over the last several months ….

(GC Exh. 8.) He then proposed several aggressive mid-term CBA changes, which are summarized below:[10]

Article	Summary
2.3 Exigent Circumstances (new article)	The Symphonies made a far-reaching *exigent circumstances* proposal, which deeply undercut the Union's contractual rights and stated that, "[i]n the event of an extraordinary and unforeseen occurrence, having a major economic effect on the Association and requiring immediate action … , as determined solely by the Association, … in accordance with its sole and exclusive judgment and discretion," it could: … (2) "adjust and reduce minimum compensation rates;"; … (5) "change … any job, position, season schedule … ; (7) "amend … or cancel Individual Contracts and/or their terms;"; … and (9) "take whatever other action is … necessary …." It provided that, "any such change … shall not be subject to the grievance and arbitration procedures or subject to bargaining …."
5.2A Players Committee	It proposed that only "current orchestra members" can be elected to the Players Committee and elections would be held "annually … at the first rehearsal of the full orchestra."
7.3 Overtime	It proposed changing from overtime pay for "time worked beyond the allotted service time," to overtime pay after "more than forty (40) hours in any workweek."
7.9 Informances	It proposed paying musicians 50% of their service rate (i.e., instead of their full service rate).
8.6A Tenure	It sought to eliminate seniority rights.
8.7C (new article)	It proposed that, "[a]ny musician who exhibits symptoms or tests positive for COVID-19 will be released from all services … for a period of at least fourteen (14) days. … [T]o be eligible to return, he or she must test negative twice at least 24 hours apart, show no symptoms for 72

[8] The Union did not dispute this characterization.

[9] The operation of the automatic renewal provision is discussed in depth in the *Analysis* section below.

[10] These changes, in their totality, were sweeping and would have eviscerated the Union's rights under the CBA, which made acquiescence impossible.

	hours and obtain the Association's advance written consent before returning to service."
9.1A	It stated that, "voting shall be by secret ballot … if consensus cannot be reached."
11.1A Grievance	It proposed restricting a grievance to "the term of … [the] Individual Contract."
Wages	It proposed cutting minimum compensation rates to $94.71 for section musicians and $109.28 for principal musicians (i.e., approximately a 20% cut).
Appendix C	It proposed various COVID-19 health and safety protocols.

(GC Exh. 9.)

d. July 1—Notice of Termination and Reported Right to Withdraw Recognition

The Symphonies terminated the CBA, effective August 31, 2021.[11] (GC Exh. 11.) It then errantly declared its right to withdraw Union recognition. (Id.) It stated:

> Pursuant to Section 15.12 of the Master Agreement, the Company provides timely and written notice to the Union of the termination of the Master Agreement. The Master Agreement shall now expire and terminate effective August 31, 2021.
>
> The Company reserves the right to provide notice of anticipatory withdrawal of recognition no more than 90 days before August 31, 2021 … and withdraw upon expiration of the Master Agreement ....

(Id.)

e. July 9–Symphonies' Grievances

As a follow-up (i.e., because a mid-term proposal to gut the CBA and stated intention to withdraw union recognition was apparently insufficient), the Symphonies filed 2 grievances. One grievance challenged the Union's shop steward selection process (i.e., an internal union matter) and another contested the Union's unwillingness to agree to the Symphonies' antagonistic mid-term proposals. (GC Exh. 12).

f. July 20 and 21—Union Replies

On July 20, Watsky sent this reply to the Symphonies:

> We have received the Association's … rewrite of the Master Agreement …. [T]his document … attempts to change the current Master Agreement in ways that have nothing to do with the current crisis. The Union does not agree to reopen the Master Agreement, but … will continue to bargain in good faith with regard to COVID-19 ….
>
> That being said, we are attaching our response ….
>
> Regarding the Association's grievance in connection with Article 5, the Association is … interfer[ing] in Union internal business ….

(GC Exh. 13.) Watsky then proposed these mid-term changes to the 2019–2020 CBA:

Article	Summary
2.3 Exigent Circumstances	The Union rejected the proposal.
5.2A Players Committee	The Union rejected the proposal.
7.3 Overtime	The Union rejected the proposal.
7.9 Informances	The Union rejected the proposal.
8.6A Tenure	The Union rejected the proposal.
8.7C	The Union countered that it would solely discuss COVID-19 issues.
~~**9.1A**~~	~~The Union agreed to the Symphonies proposal.~~[12]
11.1A Grievance	The Union rejected the proposal.
Wages	**Section** **Principal** **2019-20:** $118.39 $136.60 **2020-21:** $120.76 $139.33
Appendix C	The Union countered that it would solely discuss safety protocols.

(GC Exh. 14.) On July 21, the Union made a COVID-19 safety proposal. (GC Exh. 16.)

g. July 24–Symphonies' Declare Impasse and Make Last, Best and Final Offer

Hartsfield then declared a bargaining impasse. In doing so, he speciously described the parties' talks as postexpiration bargaining, where the employer was free to bargain to a good faith impasse and tender a last, best and final offer (i.e., as opposed to mid-term modification discussions, which required Union consent). His communication contradicted his July 1 letter (i.e., from just 3 weeks before), which had expressly stated that the CBA would not expire until August 31, 2021. (GC Exh. 11.) In support of this "fugazi," Hartsfield made the following last, best and final offer:[13]

[11] The notice was sent on July 1, 2020, i.e., in the middle of the 2019-20 CBA that expired on August 31, 2020. The termination notice did not, however, seek to terminate the 2019–2020 CBA; it, instead, sought to terminate the succeeding September 1, 2020, to August 31, 2021 CBA (the 2020–2021 CBA), which automatically renewed in the absence of any written notice to terminate under Art. 15.12 *Term of the Master Agreement.*

[12] Agreed upon, or withdrawn, proposals have been identified with a strikethrough.

[13] In the *Wolf of Wall Street*, incumbent stockbroker Mark Hanna (played by Matthew McConaughey) aptly defined the term "fugazi" to

Article	Summary
2.3 Exigent Circumstances	It re-proposed its original proposal.
5.2A Players Committee	It re-proposed its original proposal.
7.3 Overtime	It "accept[ed] the Union's … rates for … 2019-20 …." It "maintain[ed] its rates of $94.71 for section and $109.28 for principal[s] … for the 2020-21 season."
7.9 Informances	Its position was unclear.
~~**8.6A Tenure**~~	~~It withdrew its proposal.~~
8.7C	It re-proposed its original proposal.
~~**9.1A**~~	~~This matter was resolved and accepted.~~
~~**11.1A Grievance**~~	~~It withdrew its proposal.~~
Wages	See *Overtime* above (i.e., proposed rates).[14]
Appendix C	It re-proposed its original proposal.

(GC Exhs. 17–18). He added that his "last, best and final offer," would be implemented on July 31, absent the Union's acceptance. (Id.)

h. July 30—Union Response and Information Request

The Union again reminded the Symphonies that they were engaged in mid-term discussions, where the Union had the right to consent to any contractual changes. It stated that:

> [W]e are not reopening the … agreement …. We have a contract ….
>
> [Do] not regard non-response of proposals as consent. In absence of agreement for change … , the agreement as written stands.
>
> We will … bargain in good faith, … but we are not compelled to agree to changes ….
>
> Regarding the Association's declaration of a last best and final offer, and its implementation, you have no right to do this as the Master Agreement does not expire until after the 2020-2021 season.
>
> Nevertheless, we … [will] seek to face the difficulties … of [the] … pandemic. We are preparing a counter proposal …. A summary of our response is below:
>
> Players Committee: We are rejecting the Association's proposals …. The Association cannot by law bargain the methods of Union internal business …..
>
> Exigent Circumstances: We have countered the Association's "exigent circumstances" proposals … [o]ur proposals for concert cancellation and … safety protocols serve that purpose ….
>
> Wages: We are providing a counter proposal on wages.
>
> Tentative Agreements: We are agreeing to bargain several matters that have already been in discussion, some of which have come to tentative agreement ….
>
> The Union expects that the musicians' contracts will be in full compliance with the current terms of the Master Agreement. Furthermore, to the extent that contracts are sent to musicians, please send copies … to the Union … at the same time as they are sent to the musicians ….
>
> Please see attached for the Union's counter-proposals.

(GC Exh. 19)(information request highlighted). The Union's rejection of the "last, best and final offer" prompted the Symphonies to implement its proposal, which it had no right to do.

5. July 31—Symphonies Tenders Employment Contracts to Musicians

In furtherance of the implementation of the "last, best and final offer," Musical Director Austin emailed employment contracts to musicians LeeAnne Thompson and Sonja Ryberg, which offered slots for the 2020-2021 concert season. (GC Exhs. 22–24.) The emails stated, inter alia, that: (1) "Compensation has been adjusted …. per service rates have been reset to $109.28 for principal and $94.71 for section players."; … (4) "Bonus. … you [are eligible to] … receive a bonus of $16 per service …." (Id.).

6. August 18—Union Email

In a final attempt to prevent the instant litigation, the Union sent this email:

> [Y]ou are resisting our master agreement, as you have been insisting on renegotiation and attempting to make changes to it each season. By your issuance of a last best and final offer including sweeping exigent circumstances language, and … having now implemented it unilaterally, you have … effectively override[n] the CBA …. [Y]ou have no right to implement as our Master Agreement is still in effect for another year ….

(GC Exh. 25.)

7. June 4, 2021—Symphonies' Notice of Intention to Withdraw Recognition

Under the heading of the "best laid plans of mice and men often go awry," the Symphonies then withdrew its recognition of the Union:

> [We] are parties to a collective bargaining agreement ….

rookie Jordan Belfort (played by Leonardo DiCaprio) in the following way, "fugazi; fugauzy; it's a whazzy; it's a woozy; it's fairy dust; it doesn't exist; it's never landed; it is no matter; it's not on the elemental chart." Scorsese, Martin. *The Wolf of Wall Street*. Paramount Pictures, 2013.

[14] The parties had previously agreed that section musicians received $118.39 per session, and principal musicians received $136.60 per session for the September 1, 2019, to August 31, 2020 period. (Tr. 59.)

> On July 1, 2020 …, the Company provided … written notice … of the termination of the Master Agreement …. [which] will now … terminate on August 31, 2021.
>
> The Company hereby provides the Union with notice of the Company's anticipatory withdrawal of recognition. Upon expiration of the Master Agreement on August 31, 2021, the Company will withdraw recognition from the Union and decline to bargain for a successor labor agreement.

(GC Exh. 26.)

In support of its actions, Music Director Austin testified that:

> [The Union] has never been certified as a representative of the musicians. The Union has never collected and presented to the Orchestra authorization cards, a petition, or any evidence signed by the majority of the musicians, that they designate the Union as their bargaining agent.

(Tr. 267). He added that, when the Symphonies withdrew recognition, the majority of the musicians reported great dissatisfaction with the Union. It is undisputed, however, that: a written petition or other document showing that a majority of musicians no longer wanted to be represented by the Union was never submitted to the Symphonies; the Symphonies only withdrew recognition on the basis of anecdotal evidence of oral complaints from its musicians; and a decertification petition was never filed with the Board.

8. June 5, 2021—Withdrawal of Union Recognition Announced to Musicians

The Symphonies emailed the following announcement to its musicians:

> The … Orchestra is pleased to offer … [a] contract for the 2021-2022 Season ….
>
> The current Master Agreement between the Orchestras and … Union … expires on August 31, 2021. The Orchestras have provided the Union with notice that recognition will be withdrawn upon contract expiration. After August 31, the Union will not be recognized …. Most terms and conditions of the Master Agreement, however, will remain in place as adopted rules or policies ….

(GC Exh. 27.) It attached a CBA, which cited the personnel rules that it retained. (GC Exh. 28.)

9. June 12, 2021—Union's Renewed Information Request

Watsky sent the following email to the Symphonies:

> [The Union] … received contracts for the strings' players, but never got any of the contracts for the non-string players. Please send those contracts to me.

(GC Exh. 32.)

B. Analysis

1. Deferral Defense

The Symphonies assert that deferral of this matter under *Collyer Insulated Wire*, 192 NLRB 837 (1971), is appropriate; this contention lacks merit.[15] Deferral is appropriate when:

> (1) the parties' dispute arises within the confines of a long and productive collective-bargaining relationship; (2) there is no claim of employer animosity to the employees' exercise of Section 7 rights; (3) the parties' agreement provides for arbitration in a very broad range of disputes; (4) the parties' arbitration clause clearly encompasses the dispute at issue; (5) the party seeking deferral has asserted its willingness to utilize arbitration to resolve the dispute; and (6) the dispute is well suited to resolution by arbitration.

San Juan Bautista Medical Center, 356 NLRB 736, 737 (2011).

Deferral is inappropriate. *First*, the dispute does not arise within the "confines of a long and productive collective-bargaining relationship." On the contrary, it arose under the auspices of a broken bargaining relationship involving withdrawal of Union recognition. *San Juan Bautista Medical Center*, supra; *Beverly Enterprises*, 310 NLRB 222, 257–258 (1993), enfd. in relevant part sub nom. *Torrington Extend-A-Care Employee Assn. v. NLRB*, 17 F.3d 580 (2d Cir. 1994). *Second*, the unlawful withdrawal of recognition demonstrated a "high-degree of employer animosity to the employees' exercise of Section 7 rights," which makes this matter poorly-suited for deferral. *Third*, the allegations involved herein are categorically inappropriate for deferral. See, e.g., *Avery Dennison*, 330 NLRB 389, 391 (1999) ("withdrawal of recognition and subsequent changes in working conditions, are particularly poor subjects for deferral."); *San Juan Bautista Medical Center*, supra (mid-term contract changes involving unambiguous provisions, as is the case herein, are inappropriate for deferral); *New Mexico Symphony Orchestra*, 335 NLRB 896, 897 (2001)(same); *Team Clean, Inc.*, 348 NLRB 1231, fn. 1 (2005)(information issues).

2. Mid-Contract Unilateral Changes[16]

The Symphonies violated §8(a)(5) within the meaning of §8(d), when it unilaterally changed the wage, Players Committee and exigent circumstances provisions during the term of the 2019–2020 CBA, without the Union's consent.

a. Automatic Renewal and CBA Term

As a threshold matter, the 2019–2020 CBA was in effect, when the Symphonies unilaterally implemented its wage, Players Committee and exigent circumstances modifications on July

[15] Deferral is a threshold question, which must be decided before the merits of the unfair labor practice allegations can be considered. *L.E. Myers Co.*, 270 NLRB 1010, 1010 fn. 2 (1984).

[16] This allegation is pled under complaint ¶¶11, 13, and 15–16.

31, 2020.[17] The CBA's automatic renewal clause provided that:

> This Agreement shall … continue indefinitely unless either party gives written notice … of termination…. [and] if no notice … is given prior to September 1 of the current year, then the term of the Master Agreement shall automatically be extended for one full additional year, through August 31 ….

Or put another way, absent written notice of termination, the CBA runs for 1-year terms, which begin on September 1 and end on August 31.

The CBA automatically renewed for the September 1, 2019, to August 31, 2020 contractual term and was effective when the July 31 unilateral changes were implemented. *First*, because the CBA requires written notice of termination, the absence of an exhibit showing written termination before the CBA's September 1, 2019 renewal date establishes that no such notice was proffered and that the CBA automatically renewed.[18] *Second*, the parties' correspondence solely discusses an August 31, 2021 expiration, which further supports that the 2019–2020 and 2020–2021 CBAs were mutually understood to be automatic renewals. (R. Exh. 28 ("CBA expires in August 2021."); GC Exh. 5 (same); GC Exh. 11 ("Master Agreement shall now expire and terminate effective August 31, 2021."); GC Exh. 13 (same); GC Exh. 15 (same).[19] In sum, the 2019–2020 CBA was an automatic renewal, which was effective when the July 31 changes were enacted. The July 31 unilateral changes must, therefore, be analyzed as mid-term contract modifications.

b. General Precedent—Mid-Term Contract Modifications

"To determine whether an employer has modified, i.e., failed to adhere to the contract, the Board applies the 'sound arguable basis' standard." *MV Transportation*, 368 NLRB No. 66 (2019). "If an employer has a sound arguable basis for its interpretation and the General Counsel presents a reasonable interpretation of the relevant contractual language, the Board will not seek to determine which interpretation is correct." Id. citing *NCR Corp.*, 271 NLRB 1212, 1213 (1984); see also *Bath Iron Works*, 345 NLRB 499, 501–502 (2005), enforced sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007)(where it is alleged that an employer has unlawfully modified an agreement, the Board does not examine whether the union clearly and unmistakably waived its right to bargain over the change but, instead, examines whether the employer has altered the contract's terms without union consent). As a result, the Board will not find a violation, where the employer has a "sound arguable basis" for its contractual interpretation, and it is not motivated by animus, acting in bad faith, or in any way seeking to undermine the union. *Bath Iron Works*, supra. The Board assesses whether a party has a "sound arguable basis" by applying traditional principles of contract interpretation. *Conoco, Inc.*, 318 NLRB 60, 62 (1995), enforcement denied 91 F.3d 1523 (D.C. Cir. 1996).[20] The parties' actual intent is afforded controlling weight. To determine intent, the Board normally looks both at the contract language and relevant extrinsic evidence, i.e., past practice or bargaining history. *Mining Specialists*, 314 NLRB 268, 268–269 (1994), enforced 326 F.3d 602 (4th Cir. 2003); *Lear Siegler Management Service*, 293 NLRB 446, 447 (1989). The Board will, thus, only find a §8(a)(5) and §8(d) violation where an employer's interpretation is so off base or unreasonable that it amounts to a unilateral modification. *Bath Iron Works*, supra, 345 NLRB at 501–502.

i. Wage Modification

The Symphonies lacked a "sound arguable basis" under the 2019–2020 CBA to change the Unit's wages, without consent.[21] There is nothing in the CBA, either express or implied, that affords the employer the right to reduce wages at its discretion. The record also lacks any evidence of bargaining history or past practice, which establishes such a right. In sum, the Symphonies violated §8(a)(5), within the meaning of §8(d), when it unilaterally modified the Unit's minimum per session performance rates without the Union's consent.

ii. Players Committee[22]

The Symphonies lacked a "sound arguable basis" under the 2019–2020 CBA for making changes to the Player's Committee clause, without the Union's consent.[23] The Symphonies modified the Players Committee provision to add that only "current orchestra members" (i.e., as opposed to current and former musicians) can serve on the Players Committee and that their elections must be held "annually … at the first rehearsal of the full

[17] This issue is legally significant, inasmuch as it determines whether these unilateral changes should be analyzed as mid-term changes to the CBA or post-expiration changes made during bargaining.

[18] Surely, if such key evidence existed, the Symphonies would have provided it.

[19] This is persuasive evidence that both the 2019–2020 and 2020–2021 CBAs were understood to be automatic renewals. Moreover, if the Symphonies actually thought that the 2019–2020 CBA had expired previously, it would have described an expired contract and not have sought to terminate an already-expired agreement.

[20] The Board does not rely on "abstract definitions unrelated to the context in which the parties bargained." *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430 (1967). It interprets contracts in light of the "realities of labor relations … which make up the background against which such agreements are entered." *Electrical Workers IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1033 (D.C. Cir. 1986). Where there are "two equally plausible interpretations of the contract," *NCR Corp.*, 271 NLRB 1212, 1213 (1984), the Board will not arbitrate who is correct. Id.

[21] This was a substantial and material change in the Unit's wages (i.e., it reduced the parties' earlier agreement to pay a minimum rate to $118.39 per session for section musicians and $136.60 for principals. (Tr. 59).

[22] Although ¶5 of the complaint further alleged that the Symphonies unlawfully conditioned bargaining on the Union acquiescence to its Players Committee proposal, this allegation has not been independently analyzed given that it does not affect the overall remedy. *Southern Bakeries, LLC*, 364 NLRB 804, 808 fn. 4 (2016). This allegation is encompassed by the finding that the Symphonies violated §8(a)(5) within the meaning of §8(d), by unilaterally modifying the Players Committee provision in the 2019–2020 CBA without the Union's consent. This allegation was both covered by the §8(a)(5) and ¶8(d) allegations in the complaint (i.e., ¶¶11, 13, and 15-16) and fully litigated at the hearing. *Pergament United Sales*, 296 NLRB 333 (1989), enfd. 920 F.2d 130 (2d. Cir. 1990).

[23] This was a substantial and material change, which significantly changed the shop steward selection process.

orchestra for that season" (i.e., as opposed to whenever the Union chose to hold elections).

The Symphonies lacked a "sound arguable basis" under the 2019–2020 CBA to modify the Players Committee clause. *First*, although the management-rights clause empowers the Symphonies to "manage all business and artistic affairs of the orchestra," "establish and enforce reasonable rules and regulations," "maintain efficiency and … discipline," "determine the number of musicians engaged," and "determine and direct the policies, modes, and methods of operating the business," there is no retained management right to regulate the shop steward selection process. *Second*, the composition of the Players Committee and its related selection procedures are nonmandatory subjects of bargaining, which the Symphonies cannot rationally argue were bargained away via a management right's clause, which makes no mention of its unilateral right to intervene in internal union affairs.[24] *Third*, the record lacks any evidence of bargaining history or a past practice, which supports the Symphonies' authority on this issue. *Finally*, any contention that the Symphonies had a "sound arguable basis" under the 2019–2020 CBA to modify the Players Committee clause is undercut by its overall animus to the Union, which was demonstrated by its unlawful withdrawal of recognition. *Bath Iron Works*, supra (sound arguable basis undercut when company acts with animus). As a result, the Symphonies violated §8(a)(5), within the meaning of §8(d), when it unilaterally altered the Players' Committee provision without consent.

iii. Exigent Circumstances Clause

The Symphonies similarly did not have a "sound arguable basis" in the 2019–2020 CBA to unilaterally create an exigent circumstances clause absent Union consent. As noted, the broad exigent circumstances clause gave it the unfettered and unreviewable right to change the 2019–2020 CBA at its sole discretion, once it decided that it faced an "extraordinary and unforeseen occurrence, having a major economic effect … and requiring immediate action."

Although the Symphonies had a "sound arguable basis" under the management rights clause to create reasonable work rules and manage the orchestra, its exigent circumstances clause went dramatically beyond such rights and granted it the unreviewable right to unilaterally cut wages and otherwise eviscerate the CBA whenever it wanted. This kind of change "is so off base … [and] unreasonable that it amounts to a unilateral modification of a contract." *Bath Iron Works*, supra. Or put another way, the CBA did not afford it the right to enact rules that would completely eviscerate the CBA; this is an irrational construction that, if taken to its logical conclusion, would render the entire CBA and its obligations meaningless. In addition, this kind of change, when coupled with the unlawful withdrawal of recognition, demonstrated bad faith, which further undercuts its "sound arguable basis" defense under *Bath Iron Works*. It, thus, violated §8(a)(5), within the meaning of §8(d), when it unilaterally created the exigent circumstances clause.

iv. Safety Rules

The Symphonies did, however, have a "sound arguable basis" under the 2019–2020 CBA to unilaterally create COVID-19 rules under the management rights provision. Such action fit squarely within the management right to create reasonable policies, which are designed to promote the health and safety of its musicians. *MV Transportation*, supra ("[i]f an employer has a sound arguable basis for its interpretation and the General Counsel presents a reasonable interpretation of the relevant contractual language, the Board will not seek to determine which interpretation is correct."). The new safety rules did not, as a result, violate the Act.

c. Symphonies' Defenses

i. Re-Opener Defense

The Symphonies contended that it did not violate the Act by making mid-term contractual changes because it was privileged to implement these changes after bargaining to an impasse under the CBA's re-opener provision. Specifically, it stated:

> When a reopener is included in a labor contract, each party waives whatever protection §8(d) would otherwise provide against mid-term bargaining duties and unilateral modifications. See, e.g., *Boeing Co*., 337 NLRB 758, 762 (2002).

(R. Brief at 81.) This position lacks merit; a brief review of the Board's precedent is illustrative.

As a general rule, §8(d) provides that the parties to a contract have no obligation to bargain over any of its terms during the contract's term.[25] An exception is presented, however, when they agree to bargain under a contractual reopener provision. Under these circumstances, they incur the same traditional bargaining obligations and rights as they do when bargaining in the absence of a contract. See, e.g., *Hydrologics, Inc*., 293 NLRB 1060, 1061–1062 (1989) (union lawfully struck after reaching a

[24] See, e.g., *Borg-Warner Corp. v. NLRB*, 356 U.S. 342 (1958) (relations between employees and their union are nonmandatory bargaining subjects); *Betra Manufacturing Co.*, 233 NLRB 1126 (1977), enf'd 624 F.2d 192 (9th Cir. 1980), cert. den. sub nom. *Thomas v NLRB*, 450 U.S. 966 (1981) (proposed contractual clause providing that any change in the union's constitution, by-laws or affiliation was a nonmandatory subject); *UOP Norplex Division of Universal Oil Products*, 179 NLRB 657 (1969), enfd. 445 F.2d 155 (7th Cir. 1971) (union fines); *Houchens Market of Elizabethtown, Inc.*, 155 NLRB 729 (1965), enf'd 375 F.2d 208 (1967)(employee ratification of contract); *Service Employees Local 535 (North Bay Regional Center)*, 287 NLRB 1223 (1988), enf'd 905 F.2d 476 (D.C. Cir 1990), cert. denied 498 U.S. 1082 (1991)(union's "agency fees"); *International Union of Bricklayers and Allied Craftsmen*, 306 NLRB 229, (1992)(union dues); *Mid-State Ready Mix, a Division of Torrington Industries, Inc*., 307 NLRB 809 (1992) (union's selection of its stewards and grievance representative is nonmandatory); *Kit Mfg. Co., Inc.*, 150 NLRB 662, 671–672 (1964), enfd. 365 F.2d 829 (9th Cir. 1966) (number of stewards).

[25] §8(d) states, inter alia, that it, "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract."

good faith impasse in support of its contractual wage reopener proposals); *Speedrack, Inc*., 293 NLRB 1054, 1055–1056 (1989), review denied sub nom. *IBEW Local 47 v. NLRB*, 927 F.2d 635 (D.C. Cir. 1991) (employer lawfully implemented proposals under contractual wage reopener). The Board explained that, "[w]hen parties agree to a reopener provision, they essentially choose flexibility over stability as to those provisions of their contract governed by the reopener...." *Speedrack, Inc*., supra, 293 NLRB at 1054–1055.[26] In assessing whether a valid reopener exists, the Board has found that a bare-bones agreement to bargain over a subject during a contract's term does not, in itself, constitute an agreement to reopen the contract for that matter. Id. A party's agreement to reopen a contract is also not established simply by its agreement to discuss the other party's midterm proposals, nor by meeting and offering its own counterproposals.[27] Rather, contracting parties must clearly establish that they intended not simply to bargain about an issue during their contract but that they also intended to reopen and terminate their contract on that issue. Id.

In the instant case, the CBA fails to demonstrate that the Union agreed to a reopener regarding wages, the Players Committee, or exigent circumstances. There is no mention of a specific intention to reopen on these subjects anywhere in the CBA. Although the Symphonies contend that Art. 15.14 *Promise to Bargain,* which states that the "parties … are required to meet and bargain in good faith upon receipt of written notice dated at least ninety (90) days prior to the conclusion of any season" is a reopener, this provision is simply too generalized to operate as a reopener.[28] *Speedrack, Inc*., supra. Also, construing Art. 15.14 *Promise to Bargain* as a reopener would render Art. 15.7 *Amendments* (i.e., which provides that, "[n]o … amendments … shall be made except by mutual consent") utterly meaningless, which is unreasonable.[29] On this basis, I find that the 2019–2020 CBA did not contain a reopener, which allowed the Symphonies to enact unilateral changes after bargaining to a good faith impasse.[30]

ii. Exigent Circumstances

Although the Symphonies contend that exigent economic circumstances created by the pandemic excused the midterm contractual modifications, this position similarly lacks merit. The Board has held that, while an employer may be excused under certain circumstances from bargaining over mandatory subjects due to an economic exigency, an exigency is not a defense to a mid-term modification allegation under §8(a)(5) and §8(d). *Oak Cliff-Golan Baking Co*., 207 NLRB 1063, 1064 (1973) (economic crisis and financial considerations are irrelevant where employer reduced wages in violation of the contract). The Board's exigent circumstances precedent permits unilateral action with no or expedited bargaining in noncontract situations where, as a result of an economic emergency, there is no time for negotiations. *RBE Electronics*, 320 NLRB 80, 82 (1995); *Bottom Line Enterprises*, 302 NLRB 373 (1991). However, in a contractual context, the parties have already bargained and are bound by their contract. Accordingly, as noted by the Board, "[n]owhere in the statutory terms is any authority granted to us to excuse the commission of the proscribed action because of a showing either that such action was compelled by economic need or that it may have served what may appear to us to be a desirable economic objective." *Oak Cliff-Golan Baking Co*., supra, 207 NLRB at 1064. The Symphonies' exigent circumstances defense, as a result, must fail.

3. Withdrawal of Recognition[31]

The Symphonies violated §8(a)(5), when it withdrew Union recognition. The standard for withdrawal of recognition is set out in *Levitz Furniture*, 333 NLRB 717 (2001). In order for an employer to validly withdraw recognition, it must "prove by a preponderance of evidence that the union had, in fact, lost majority support when the employer withdrew." Id. If it fails to do so, its withdrawal is unlawful. Id. Employees' statements of mere "dissatisfaction" with union performance do not show "opposition to union representation itself," which satisfies the "actual loss of majority standard." Id. at 728, citing *Allentown Mack Sales*, 316 NLRB 1199, 1208 (1995), enfd. 83 F.3d 1483 (D.C. Cir. 1996), revd. 522 U.S. 359 (1998). Employee statements seeking to withdraw union membership similarly do not support unilateral withdrawal of recognition. *DaNite Sign Co*., 356 NLRB 975 (2011).

The instant withdrawal of recognition was unlawful. The Symphonies wholly failed to show by a preponderance of the evidence that it had "objective evidence" that "reliably indicates" that the Union "had, in fact, lost majority support when the employer withdrew." *First*, it never received a petition or other documentation from Unit musicians, which expressly and objectively confirmed the Union's actual loss of majority support. *Levitz*, supra. *Second*, as noted above, anecdotal comments from various musicians, without an accompanying written petition, are insufficient to support a withdrawal of Union recognition. *DaNite Sign Co*., supra. *Finally*, the Symphonies' contention that it was justified to withdraw Union recognition because

[26] Or put another way, when parties agree to reopen their contract, they effectively agree to terminate their contract as to the reopened matters. *Hydrologics, Inc*., supra, 293 NLRB at 1062 ("during a reopening, a contract, at least as to reopened provisions, has been effectively terminated for a certain period.").

[27] See, e.g., *Herman Bros., Inc*., 273 NLRB 124, 124 fn.1 (1984), enfd. mem. 780 F.2d 1015 (3d Cir. 1985) (union did not "tacitly agree" to reopen contract simply by agreeing to discuss employer's midterm wage modifications and offering own counterproposals); *Mack Trucks*, 294 NLRB 864, 865 (1989) (same); *Connecticut Light & Power Co.*, 271 NLRB 766, 766–767 (1984) (absent contractual reopener, recipient of midterm proposal has no duty to discuss or agree to it, while party proposing midterm modification incurs no bargaining obligation by tendering proposal).

[28] If it were a reopener, it would specifically list which clauses in the CBA were subject to reopening, which it does not. This clause is only an invitation to bargain; if it were deemed a reopener, its general language would operate as a reopener of the *entire agreement at any time either party gives notice*, which is not a reasonable construction.

[29] If the parties had an agreement to reopen the entire contract under Art. 15.14 *Promise to Bargain*, Art. 15.7 *Amendments,* mutual consent would serve no function, given that the employer could bargain to a good faith impasse and then implement (i.e., an action not requiring mutual consent).

[30] This does not suggest that the parties bargained to a good faith impasse.

[31] This allegation is pled under complaint ¶¶ 14 and 15.

the Union never had majority support, when it was first recognized is invalid. This assertion contradicts the Board's well-established holding that, in the context of nonconstruction industry employers, "[i]f an employer voluntarily recognizes a union based solely on that union's assertion of majority status, without verification, an employer is not free to repudiate the contractual relationship that it has with the union outside the §10(b) period, i.e. beyond the 6 months after initial recognition, on the ground [that] the union did not represent a majority when the employer recognized the union." *Strand Theatre*, 346 NLRB 523, 536 (2006) enfd. 493 F.3d 515 (5th Cir. 2007); see also *Musical Arts Assn.*, 356 NLRB 1470, 1478, 1483 (2011).

4. Information Requests[32]

The Symphonies did not violate §8(a)(5), when it failed to fulfill the Union's July 30 information request seeking musician contracts for the 2020–2021 season. It is well-established that, upon request, an employer must provide the collective-bargaining representative of its employees with information that is necessary and relevant to its representational capacity. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967). Relevancy is assessed under a broad discovery-type standard, and it is only necessary to show the probability that the information sought would be useful to the union in carrying out its role. Id.

The waiver of the right to relevant information is not lightly inferred and must be "clear and unmistakable." *Metropolitan Edison v. NLRB*, 460 U.S. 693, 708 (1983); *Skyway Luggage Co*., 117 NLRB 681 (1957). The party asserting waiver must show that the parties "unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). In addition, the "[f]ailure to provide information in the past does not constitute a continuing waiver." *Owens-Corning Fiberglass*, 282 NLRB 609 (1987).

In the instant case, the Union clearly and unmistakably waived its right to have the Symphonies supply individual musician contracts to the Union. Art. 8.5 of the CBA states that, "[t]he Association shall not be required to supply a copy of each Individual Contract to the Union, but the President of the Union and/or the Union's legal counsel may review the Individual Contracts in the Association's office." The Union, as a result, clearly and unmistakably waived its right to request copies of individual contracts from the Symphonies, and expressly agreed that its sole mechanism for reviewing individual contracts involved visiting the Symphonies' offices. One would be hard-pressed to find a clearer and more unmistakable waiver.[33]

5. Direct Dealing[34]

The Symphonies violated §8(a)(5), when it sent offer letters and employment contracts to musicians, which, inter alia, reduced the wages provided under the 2019–2020 CBA. An employer engages in direct dealing when: (1) it communicates directly with unionized employees; (2) its comments sought to establish or change wages, hours, and terms and conditions of employment or to undercut the union's bargaining role; and (3) its comments were made to the exclusion of the union. *El Paso Electric Co*., 355 NLRB 544, 545 (2010).

In this case, all of the elements of direct dealing have been met. *First*, the Symphonies communicated directly with Unit musicians. *Second*, it sought to establish wages, hours and terms and conditions of employment, which represented a reduction of those wages provided under the 2019–2020 CBA.[35] Its actions also undercut the Union's bargaining role, inasmuch as the offer letters and employment contracts implemented an unlawful midterm change. *Finally*, these actions excluded the Union.

CONCLUSIONS OF LAW

1. The Symphonies are a single employer within the meaning of the Act.

2. The Symphonies are an employer engaged in commerce within the meaning of §2(2), (6), and (7) of the Act.

3. The Union is a §2(5) labor organization, which serves as the designated exclusive collective-bargaining representative of the Symphonies' musicians at the Garland Symphony Orchestra Association in Garland, Texas, the Las Colinas Symphony Orchestra Association in Irving, Texas and Symphony Arlington in Arlington, Texas in the following appropriate collective bargaining unit (the Unit):

> Included: All musicians.
>
> Excluded: Confidential and professional employees, guards, and supervisors as defined by the National Labor Relations Act.

4. By withdrawing recognition from the Union as the exclusive collective-bargaining representative of musicians in the Unit, the Symphonies violated §8(a)(5) and (1) of the Act.

5. By unilaterally implementing changes to wages and the Players Committee clause, and by unilaterally creating an exigent circumstance provision, without the Union's consent, the Symphonies modified the parties' collective-bargaining agreement in violation of §8(a)(5) and (1) and §8(d) of the Act.

6. By sending out employment contracts to musicians, which reduced their wages below the minimum rates provided for in the

[32] This allegation is pled under complaint ¶¶12 and 15.

[33] Although one could contend that the Symphonies would not have provided this information to the Union in light of its August 31, 2021 withdrawal of recognition and other actions, the Union had 13 months from its initial information request to test this hypothesis and, thereafter, file a ULP charge in the event that the Symphonies failed to comply with its request to review musician contracts in-person at the Association's offices.

[34] This allegation is pled under complaint ¶¶10 and 15.

[35] Art. 7.1. of the CBA provided that, "[t]he Association shall pay at least the amounts provided for in Exhibit l." The offer letters, which reduced musicians' wage below the rates provide under the CBA violated this article.

parties' 2019–2020 CBA without the Union's consent, the Symphonies bypassed the Union and dealt directly with Unit musicians in violation of §8(a)(5) and (1) of the Act.

7. These unfair labor practices affect commerce within the meaning of §2(6) and (7).

8. The Symphonies have not violated the Act in any other manner alleged.

REMEDY

The appropriate remedy for the violations found herein is an order requiring the Symphonies to cease and desist from its unlawful conduct and to take certain affirmative action.

Having found that the Symphonies have been failing and refusing to bargain collectively with the Union by unilaterally changing Unit wages and the Players Committee clause during the term of the 2019–2020 CBA without the Union's consent, and by unilaterally implementing an exigent circumstances clause during the term of the 2019–2020 CBA without the Union's consent, and by directly dealing with employees and bypassing the Union, the Symphonies are directed to reinstitute the terms and conditions of employment that existed before its unlawful actions. They shall make employees whole for any loss of earnings and other benefits resulting from its unlawful unilateral mid-contract changes as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Under *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014), it shall compensate Unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award. In addition, under *AdvoServ of New Jersey, Inc.,* 363 NLRB 1324 (2016), and *Cascades Containerboard Packaging–Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), it shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order (or such additional time as the Regional Director may allow for good cause shown), file with the Regional Director for Region 16: a report allocating backpay to the appropriate calendar year(s); and a copy of each backpay recipient's corresponding W–2 form(s) reflecting the backpay award. The Regional Director will then assume responsibility for transmitting the report and form(s) to the Social Security Administration at the appropriate time and in the appropriate manner. Finally, the Symphonies shall post the attached notice in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010).

The Symphonies, which has unlawfully withdrawn recognition from the Union as the exclusive collective-bargaining representative of the Unit, shall also be ordered to recognize the Union and, upon request, bargain for a reasonable period of time (as set forth in *Lee Lumber & Building Material Corp*., 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002)) with the Union as the bargaining representative of the Unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed document.

The Board has previously held that an affirmative bargaining order is "the traditional, appropriate remedy for a §8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Caterair International*, 322 NLRB 64, 68 (1996). For the reasons set forth in *Caterair*, and applying this Board precedent, an affirmative bargaining order is warranted as a remedy herein.

While the Board applies *Caterair*, in several cases, the U.S. Court of Appeals for the D.C. Circuit has required the Board to justify on the facts of each case the imposition of an affirmative bargaining order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 738–739 (D.C. Cir. 2000); *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In view of this, the Board analyzes the facts in accordance with the D.C. Circuit cases which, as summarized by the Court in *Vincent*, supra at 738, require that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' §7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act."

Adhering to the Board's approach and analyzing the facts under the three-factor balancing test outlined by the D.C. Circuit, an affirmative bargaining order is warranted for these reasons:

> (1) An affirmative bargaining order vindicates the §7 rights of the Unit employees who were denied the benefits of collective bargaining through their designated representative by the Symphonies' withdrawal of recognition. The refusal to recognize the Union occurred at a time when the employer was making significant mid-term wage cuts and modifications to the parties' collective-bargaining agreement, but also during a time when there was no employee effort to decertify the Union.
>
> (2) At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the §7 rights of employees who may oppose continued representation by the Union because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violations. Since the Union was unfairly deprived of an opportunity to represent employees, it is only by restoring the status quo ante and requiring the Symphonies to bargain with the Union for a reasonable period of time that the employees will be able to fairly assess the Union's effectiveness as a bargaining representative in an atmosphere free from unlawful conduct. The employees can then determine whether continued representation by the Union is in their best interest.
>
> (3) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. It removes the incentive to delay bargaining in the hope of further discouraging support for the Union. It ensures that the Union will not be pressured by the possibility of a decertification petition or by the prospect of an imminent withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and the issuance of a cease-and-desist order.
>
> (4) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent's

> withdrawal of recognition and refusal to bargain with the Union because it would permit another challenge to the Union's majority status before the taint of the Respondent's previous unlawful withdrawal of recognition has dissipated. Such a result would be particularly unfair in circumstances such as those here, where the unfair labor practices precluded effective bargaining representation and rendered it difficult if not impossible for the Union to win back employee support that it had lost. Allowing another challenge to the Union's majority status without a reasonable period for bargaining would be unjust given that the withdrawal of recognition would likely have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. In these circumstances, permitting a decertification petition to be filed immediately might very well allow the Symphonies to profit from its unlawful conduct. I find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued Union representation.

For all the foregoing reasons, an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations herein.

A notice reading remedy is also appropriate. A notice reading is warranted where the employer's violations are serious enough that a reading is necessary to dissipate the chilling on §7 rights. *Wismettac Asian Foods, Inc*., 370 NLRB No. 35, slip op. at 4, 53 (2020). Here, the Symphonies committed serious violations, including mid-term modifications to the contract and withdrawal of Union recognition. Accordingly, I recommend that it hold a mandatory employee meeting, or meetings, on working time and at times when it customarily holds meetings, to ensure the widest possible employee attendance, at which its representative(s) read aloud the Notice to employees, in the presence of a Board Agent, or in a manner and location otherwise ordered by the Regional Director of Region 16, or at its option, have a Board agent read aloud the Notice or in a manner and location otherwise ordered by the Regional Director of Region 16 in the presence of a responsible Respondent official.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[36]

ORDER

Garland Symphony Orchestra Association, Garland, Texas, Las Colinas Symphony Orchestra Association, Irving, Texas, and Symphony Arlington, Arlington, Texas, a single employer, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Failing and refusing to bargain collectively with the Dallas Fort-Worth Professional Musicians Association, Local 72-147, American Federation of Musicians as the exclusive collective-bargaining representative of the following appropriate collective bargaining unit of employees employed at the Garland Symphony Orchestra Association, Garland, Texas, Las Colinas Symphony Orchestra Association, Irving, Texas, and Symphony Arlington, Arlington, Texas (the Unit) by withdrawing recognition from the Union as the exclusive collective-bargaining representative of musicians in this Unit:

> Included: All musicians.
>
> Excluded: Confidential and professional employees, guards, and supervisors as defined by the National Labor Relations Act.

b. Failing to continue in effect the terms of the 2019–2020 CBA and 2020–2021 CBA, which were both automatic renewals, by unilaterally implementing changes to wages and the Players Committee, and by creating an exigent circumstance clause, without the Union's consent.

c. Bypassing the Union and directly dealing with Unit musicians by sending out employment contracts to musicians, which cut wages below the minimum rates provided for in the 2019–2020 CBA, without the Union's consent.

d. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by §7 of the Act.

2. Take the following affirmative action necessary to effectuate the Act's policies.

a. Recognize and, upon request, bargain with the Union as the exclusive collective-bargaining representative of Unit musicians concerning their terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

b. Rescind the unilateral changes to wages and the Players Committee and restore the status quo ante as it existed prior to July 31, 2020, and continue in effect all of the terms and conditions of employment contained in its 2019–2020 CBA, or other applicable collective-bargaining agreement, with the Union.

c. Rescind the unilateral creation of the exigent circumstance clause and restore the status quo ante as it existed prior to July 31, 2020, and continue in effect all of the terms and conditions of employment contained in its 2019–2020 CBA, or other applicable collective-bargaining agreement, with the Union.

d. Make affected Unit musicians whole for any loss of earnings and other benefits suffered as a result of the unilateral changes and direct dealing allegations, in the manner set forth in the remedy section.

e. Compensate affected Unit musicians for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay awards to the appropriate calendar year for each employee and a copy of the corresponding W–2 forms reflecting the backpay award.

f. Preserve and, within 14 days of request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records,

[36] If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

g. Within 14 days after service by the Region, post at its Garland, Irving and Arlington, Texas facilities the attached notice marked "Appendix."[37] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 31, 2020.

h. Hold meetings during working hours at the Garland Symphony Orchestra Association, Las Colinas Symphony Orchestra Association, and Symphony Arlington (i.e., meetings are to be held at all 3 locations), scheduled to ensure the widest possible attendance of employees, at which the attached Notice to Employees marked "Appendix A" will be read to the employees by Music Director Austin (or, if he is no longer employed by the Respondent, by an equally high-ranking responsible management official of the Respondent) in the presence of a Board agent and, if the Union so desires, a Union representative, or, at the Respondent's option, by a Board agent in the presence of Austin (or an equally high-ranking management official if Austin is no longer employed by the Respondent), and, if the Union so desires, a Union representative.

i. Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. July 21, 2022

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively with the Dallas Fort-Worth Professional Musicians Association, Local 72-147, American Federation of Musicians (the Union) as the exclusive collective-bargaining representative of the following appropriate collective-bargaining unit of musicians employed by the Garland Symphony Orchestra Association in Garland, Texas, Las Colinas Symphony Orchestra Association in Irving, Texas, and Symphony Arlington in Arlington, Texas (the Unit) by withdrawing recognition from the Union as the exclusive collective-bargaining representative of our musicians in the following Unit:

Included:	All musicians.
Excluded:	Confidential and professional employees, guards, and supervisors as defined by the National Labor Relations Act.

WE WILL NOT fail to continue in effect the terms of the 2019–2020 and the 2020–2021 collective-bargaining agreements, which were both automatic renewals, by unilaterally implementing changes to wages and the Players Committee provision, and by creating an exigent circumstances clause, without the Union's consent.

WE WILL NOT bypass the Union and directly deal with Unit musicians by sending out employment contracts, which cut your wages below the minimum rates provided under the 2019-20 and 2020-21 collective-bargaining agreements, without the Union's consent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, upon on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the Unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL rescind the unilateral changes to wages and the Players Committee provision and restore the status quo ante as it existed prior to July 31, 2020, and continue in effect all of the terms and conditions of employment contained in its 2019–2020 collective-bargaining agreement with the Union.

WE WILL rescind the unilateral creation of the exigent circumstance clause and restore the status quo ante as it existed prior to July 31, 2020, and continue in effect all of the terms and conditions of employment contained in its 2019–2020 collective-bargaining agreement with the Union.

WE WILL make you whole for any loss of earnings and other

[37] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

benefits that you suffered as a result of our unlawful unilateral contractual modifications and direct dealing, plus interest.

WE WILL compensate you for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and we will file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee and a copy of the corresponding W–2 forms reflecting the backpay award.

WE WILL hold meetings during working hours at the Garland Symphony Orchestra Association, Las Colinas Symphony Orchestra Association, and Symphony Arlington (i.e., meetings are to be held at all 3 locations) and have this notice read to you and your fellow workers by Music Director Austin (or, if he is no longer employed by the Respondent, by an equally high-ranking responsible management official) in the presence of a Board agent and, if the Union so desires, a union representative, or, at the Respondent's option, by a Board agent in the presence of Austin (or an equally high-ranking management official if Austin is no longer employed by the Respondent), and, if the Union so desires, a union representative.

GARLAND SYMPHONY ORCHESTRA ASSOCIATION, LAS COLINAS SYMPHONY ORCHESTRA ASSOCIATION AND SYMPHONY ARLINGTON, A SINGLE EMPLOYER

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-264468 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.