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Control, Collaboration or Coverage: The NLRA and the St. Paul Chamber Orchestra Dilemma

Rochelle Gnagey Skolnick
Washington University School of Law

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INTRODUCTION

On May 27, 2003, the musicians of the Saint Paul Chamber Orchestra (SPCO) voted by a margin of nineteen to fifteen to ratify a renewal of the collective bargaining agreement (CBA or the "Agreement") between Local 30–73, American Federation of Musicians (AFM) and the St. Paul Chamber Orchestra Society (the "Society").[1] This Agreement was novel both for the negotiation methods by which it was produced, involving facilitators and interest-based bargaining,[2] as well as for its substance. The final document stood as the culmination of a Strategic Planning Process begun over three years earlier, but more importantly as the blueprint for the

* J.D. (2006), Washington University School of Law; B.M., Eastman School of Music. The author is a former professional orchestra musician. She would like to thank the numerous orchestra committee members and delegates from the International Conference of Symphony and Opera Musicians (ICSOM) who generously shared their experiences and concerns, but particularly the musicians of the St. Paul Chamber Orchestra, whose cooperation was essential.

1. Master Agreement Between The Saint Paul Chamber Orchestra and the Twin Cities Musicians Union Local 30–73 for Seasons 2003–04 Through 2006–07 (Dec. 8, 2003) [hereinafter SPCO Agreement] (on file with author).

2. *See* Paul Boulian, *A Bold Experiment: The Process*, 16 HARMONY 55, 56–57 (2003), *available at* http://www.soi.org/harmony/archive/16/Bold_Experiment_Boulian.pdf; Bruce Coppock, *A Bold Experiment*, 16 HARMONY 1 (2003), *available at* http://www.soi.org/harmony/archive/16/Bold_Exp_Coppock.pdf. The SPCO Contract Renewal Group consisted of five musicians elected by their peers, three members of the Board of Directors' Executive Committee, and three members of the senior administrative staff. Boulian, *supra*, at 56. Paul Boulian, a board member of the Symphony Orchestra Institute (SOI), and Fred Zenone, a former ICSOM chair and then-SOI President, agreed to facilitate the process. *Id*. at 56–57.

experimental future of one of America's most highly-regarded professional orchestras.[3]

In the months after the Agreement was ratified, it inspired a flurry of heated debate within the orchestral world over the wisdom and the legality of some its more controversial provisions.[4] Chief among the criticisms is the level of musician responsibility. The Agreement provides for joint management-musician committees, which will determine the artistic leadership of the institution and administer the entire scope of orchestra personnel decisions, from hiring new musicians to dismissing those whose performance no longer meets the standards of the group.[5] These joint committees raise two interrelated questions of labor law interpretation.[6] First, does the musicians' assumption of new duties place them outside of the coverage of the National Labor Relations Act's (the NLRA or the "Act")[7] statutory protections for employees? Second, are these committees NLRA-prohibited employer-dominated labor organizations, or does the committees' exercise of supervisory functions transform them into functional arms of management?

While the musicians and management of the SPCO responded to a unique set of circumstances,[8] the orchestra's quest for excellence and the financial challenges that emerged during the CBA renewal process are common to symphony orchestras across the United States.[9] Orchestra musicians and managements, which have always

3. SAINT PAUL CHAMBER ORCHESTRA, SAINT PAUL CHAMBER ORCHESTRA STRATEGIC PLAN 4 (2003), *available at* http://www.soi.org/harmony/archive/16/spcoStrategicPlan.pdf [hereinafter SPCO STRATEGIC PLAN].

4. *See, e.g.*, Laura Ross, *The 2004 ICSOM Conference*, SENZA SORDINO, Oct. 2004, at 1, *available at* http://www.icsom.org/pdf/senza424.pdf. Ross, ICSOM Secretary, reports that "[a] major [2004 ICSOM] conference topic was governance, including the increased roles some musicians are assuming in their orchestras." *Id*.

5. SPCO Agreement, *supra* note 1, at 4–6.

6. The contract raises a host of subsidiary issues that are beyond the scope of this note, but well worth considering. Perhaps most interesting is the enforceability of the provision, discussed *infra* note 62 and accompanying text, that creates an explicit waiver of management's right to claim that any musician is not an employee covered by the NLRA. SPCO Agreement, *supra* note 1, at 65.

7. National Labor Relations Act, 29 U.S.C. §§ 151–59 (2005).

8. Coppock, *supra* note 2, at 3.

9. *See, e.g.*, Donald Rosenberg, *Orchestra's Hanson is Setting the Tempo*, CLEVELAND PLAIN DEALER, May 9, 2004, at J1 ("'Almost without exception, every orchestra is facing financial challenges.'" (quoting Cleveland Orchestra Executive Director Gary Hanson)); *see*

brought unique issues to the traditional industrial labor-management paradigm,[10] have begun to redefine the division between labor and management. This change arose from the search for renewed relevance and cultural vitality in a world increasingly fraught with challenges to an orchestra's maintenance of the status quo. Management has begun to recognize that an orchestra's musicians represent a tremendously valuable, but largely untapped, resource in this effort.[11]

As orchestra boards of directors, managers, music directors and musicians reapportion institutional responsibility, everyone involved must be cognizant of the risks attendant to such an undertaking. For musicians, foremost among these risks is the danger that they may lose the very tool they have successfully employed over the past several decades to improve their wages and working conditions: the right to bargain collectively under the protection of the NLRA.[12]

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also Michael J. McMennamin, Editorial, *Donation Wouldn't Have Solved Orchestra's Problems*, COLUMBUS DISPATCH, May 29, 2004, at 13A. ("Most of the nation's successful orchestras are suffering from the same financial challenges, including Detroit, Baltimore, Chicago, Cleveland, Boston and Cincinnati."). McMennamin is the Chairman of the Columbus Symphony Orchestra's Board of Trustees. *Id.*

10. *See, e.g.*, Everette J. Freeman, *Research Issues in Orchestra Labor Relations*, 2 HARMONY 27 (1996), *available at* http://www.soi.org/harmony/archive/2/Research_Issues_Freeman.pdf (proposing additional research on a number of issues unique to the field of orchestra labor relations). Henry Fogel, former President of the Chicago Symphony Orchestra Association and current President of the American Symphony Orchestra League (ASOL) notes that "[m]any thoughtful people dislike the term 'labor-management' when applied to symphony orchestras and their musicians." Henry Fogel, *Are Three Legs Appropriate? Or Even Sufficient?*, 10 HARMONY 11, 18 (2000), *available at* http://www.soi.org/harmony/archive/10/Three_Legs_Fogel.pdf. Fogel finds this position justified because it tends to "put musicians in the category of laborers rather than professionals." *Id.* He advocates "musician-employer" as an alternate usage. *Id*. Although Fogel's commentary is likely driven by concern about unhelpful stereotypes, it disregards the fact that the NLRA explicitly embraces professionals. *See* 29 U.S.C. § 152(12) (2005), quoted *infra* note 67. Fogel's phrase substitution is emblematic of a larger cultural move away from traditional labor law models and toward employer-employee relationships unprotected by the NLRA. *See, e.g.*, Steven Greenhouse, *Splintered but Unbowed*, N.Y. TIMES, July 30, 2005, at C1 (noting that union membership has declined from 31.8% in 1948, to 12.5% in 2004).

11. *See* Jan E. Gippo, *Channels of Communication*, SYMPHONY MAG., July–Aug. 2004, at 91 (noting that musicians, whose tenure with their institutions is generally longer than that of management or board members, bring a "uniquely valuable" perspective to both daily institutional functioning and labor negotiations); *see also* Coppock, *supra* note 2, at 12 ("For more than thirty years, SPCO management and board leadership has changed on the average of every two to three years . . . .").

12. *See, e.g.*, PHILIP HART, ORPHEUS IN THE NEW WORLD: THE SYMPHONY ORCHESTRA

While the St. Paul model has not been tested before the National Labor Relations Board (NLRB) or by the courts, there is a danger that it violates American labor law and could place the musicians outside the ambit of the NLRA. Until the SPCO model has faced and survived such a test, musicians who desire more active participation in the stewardship of their institutions but are concerned about losing the protections of the NLRA, must walk a fine line to satisfy both mandates. The constituent groups of symphony orchestras must all work together to find ways to draw on the skills, talents and vision of their musicians without jeopardizing their status as employees under the NLRA.

Part I of this Note provides an overview of the traditional structure of the American symphony orchestra and its adaptation of the industrial labor-management paradigm. It examines some of the forces that motivate orchestras to explore changes to both traditional bargaining style and the substance of their agreements. Finally, it considers the genesis of the SPCO agreement and its specific terms. Part II examines the administrative and judicial case law regarding the legal issues raised by the SPCO agreement in the context of American labor law. Part III analyzes the likely outcome of challenges to the legality of the joint management-musician committees and to the status of the SPCO musicians as employees under the NLRA. Part IV considers alternatives to the St. Paul model and recommends a means for musician involvement and institutional decision-making that fits within the strictures of the NLRA.

AS AN AMERICAN CULTURAL INSTITUTION 96–119 (1st ed. 1973) (relating the history of the rise of the AFM and its successes in the orchestral field). ICSOM, established in 1962 and officially granted AFM conference status in 1969, has been especially effective at providing its members with the tools needed to achieve gains through collective bargaining. *Id*. at 114–19. Among these tools are an annual comparative chart of wages and working conditions, a conductor evaluation database, a printed periodical (SENZA SORDINO) circulated to all musicians in ICSOM orchestras, and an online discussion group called Orchestra-L. ICSOM: FORTY YEARS OF THE INTERNATIONAL CONFERENCE OF SYMPHONY AND OPERA MUSICIANS 51 (Tom Hall ed., 2002) [hereinafter ICSOM: FORTY YEARS]. ICSOM and its sister symphonic musician conferences, the Regional Orchestra Players' Association (ROPA) and the Organization of Canadian Symphony Musicians (OCSM), have influenced the AFM to devote additional resources to the symphonic sector, including the creation of a Symphony Department in 1983 (renamed the Symphonic Services Division in 1990). *Id*. at 52–55.

I. THE AMERICAN SYMPHONY ORCHESTRA

A. Traditional Governance Structure

American professional symphony orchestras are established as non-profit corporations under section 501(c)(3) of the Internal Revenue Code.[13] The traditional orchestra governance structure has been described as a "three-legged stool," with legs comprised of the chairman of the all-volunteer board of directors, the chief executive officer (CEO) of the organization, and the music director.[14] In this traditional model, the board, which bears legal responsibility for the institution, delegates oversight of artistic matters to the music director and vests administrative responsibility in the CEO and his or her staff.[15]

Within this framework, musicians have traditionally assumed limited responsibilities beyond their obligations as performers. The International Conference of Symphony and Opera Musicians (ICSOM), whose members include musicians of fifty-one of America's top orchestras, reported that for the 2004–05 season, all of the orchestras for which data was available utilized musicians to serve on committees hearing auditions of prospective members.[16] In

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13. 26 U.S.C. § 501(c)(3) (2005). The statute provides in pertinent part:

> (a) Exemption from taxation. An organization described in subsection (c) . . . shall be exempt from taxation under this subtitle . . .
>
> . . . .
>
> (c) List of exempt organizations. The following organizations are referred to in subsection (a):
>
> . . . .
>
> (3) Corporations . . . organized and operated exclusively for . . . charitable . . . or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Id.

14. Fogel, *supra* note 10, at 11.

15. Michael J. Schmitz, *Musician Participation in Symphony Orchestra Management: The Milwaukee Symphony Orchestra Experience*, 3 HARMONY 23, 25 (1996), *available at* http://www.soi.org/harmony/archive/3/Musician_Part_Schmitz.pdf.

16. WAGE SCALES AND CONDITIONS IN THE SYMPHONY ORCHESTRA, ICSOM ORCHESTRAS, 2004–2005 SEASON, at 13 (Laura Brownell ed., 2005) [hereinafter ICSOM WAGE CHART].

the same season, forty-five out of forty-nine reporting orchestras utilized an artistic dismissal review committee, which included musicians.[17] In forty-one out of forty-nine orchestras reporting, musicians served on artistic advisory committees, which typically function to channel player input on artistic matters, such as repertoire selection and programming.[18] Less common is musician input into the selection of a new music director; only thirty orchestras reported that their contracts provided for such participation.[19]

A more controversial way in which musicians have participated in institutional governance is by serving as members of the orchestra's board of directors.[20] Twenty-seven out of forty-nine reporting ICSOM orchestras include one or more musicians on their boards; in only twenty-one of those twenty-seven do the musician-board members have voting rights.[21] Musicians in other orchestras have chosen instead to experiment with coordinated efforts to educate and interact with board members without formally serving on their orchestras' boards.[22]

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17. *Id*. at 14.

18. *Id*. at 12.

19. *Id*. at 15.

20. The wisdom and propriety of musicians serving as board members have been hotly debated amongst musicians and their advisors. *See, e.g.*, Leonard Leibowitz, *Musicians on Boards: Must We?*, SENZA SORDINO, June 2003, at 6, *available at* http://www.icsom.org/pdf/senza413.pdf. Leibowitz, who serves as ICSOM Legal Counsel, points out the dangers of tokenism, musician co-optation, and the potential for a real or perceived conflict of interest that may arise when a musician who has been elected to serve as a collective bargaining representative also serves on the orchestra's Board of Directors. *Id*. *But see* Robert Levine, *Musicians on Boards: A Useful Tool*, SENZA SORDINO, June 2003, at 7, *available at* http://www.icsom.org/pdf/senza413.pdf. Levine, a past ICSOM chair, acknowledges the existence of risks, but touts musician service on boards as a way of building communication and understanding between the two disparate groups, provided that the musicians serve as true representatives of their colleagues and communicate what they observe in board meetings to the musicians they represent. *Id*.

21. ICSOM WAGE CHART, *supra* note 16, at 15. The number of board seats occupied by musicians ranges from one to nine. *Id*. The average number of seats held by musicians on ICSOM orchestra boards is 2.7. *Id*.

22. For example, the New Jersey Symphony Orchestra Committee members, who are elected by their peers to represent them in collective bargaining with their employer, attend every meeting of the Symphony's Board of Directors and its Executive Committee without serving as members of the Board. E-mail from Robert Wagner, Orchestra Committee Chair, New Jersey Symphony, to Rochelle Gnagey Skolnick (Oct. 6, 2004) (on file with author).

B. Forces for Change

Some commentators argue that symphony orchestras face unprecedented crises of funding and audience cultivation in the coming years,[23] but an even greater concern is the decreased involvement of the music director.[24] Henry Fogel, former president of the Chicago Symphony Orchestra Association, makes a convincing case for the necessity of reapportioning artistic responsibility.[25] He argues that the model of symphony orchestra governance was developed during the era of the dictatorial music director.[26] It has persisted to this day, even though a music director may only devote thirty-five to fifty percent of his or her professional time to the institution he or she nominally leads.[27] Many aspects of the

23. *See, e.g.*, Douglas J. Dempster, *The Wolf Report and Baumol's Curse: The Economic Health of American Symphony Orchestras in the 1990s and Beyond*, 15 HARMONY 1, 1 (2002), *available at* http://www.soi.org/harmony/archive/15/Wolf_Report_Dempster.pdf. In his article, Dempster, Senior Associate Dean of the College of Fine Arts at the University of Texas, Austin, and former Dean of Academic Affairs at the Eastman School of Music, critiqued a 1992 economic analysis of the symphonic industry undertaken by The Wolf Organization, Inc., and commissioned by the ASOL. *Id*. at 3. The Wolf report, based on the best available statistics and sound economic theory, projected an industry-wide deficit of over $64 million by 2000. *Id*. at 1. Nonetheless, the report's predictions proved to be inaccurate, with the industry reporting strong growth during the ten years prior to the year 2000, in which it posted an industry-wide surplus of $84.5 million. *Id*. at 3. Even when the report was first issued, those in the industry greeted the predictions with varying degrees of sanguinity and alarm. *Id*. at 4 (citing Peter Pastreich, then-Executive Director of the San Francisco Symphony, as taking "the unflappable view that crises come and go," but citing Deborah Borda, then-Managing Director of the New York Philharmonic, as viewing the Wolf Report as "a call to arms for the industry").

24. *See* Fogel, *supra* note 10, at 14–16, 25.

25. *See generally id.*

26. *Id.* at 14-16.

27. *Id*. at 25. For an account that may call into question the novelty of this problem for today's orchestras, see Philip Hart's 1973 assertion that his study of orchestras revealed how "some must accept part-time, essentially nonresident musical direction, and how others face in the not too distant future losing the services of long-time 'permanent' conductors." HART, *supra* note 12, at 457. Hart observed a "strong trend toward loosening the close bonds that have traditionally tied conductors to their orchestras in this country." *Id*. New or not, the issue is one with which major orchestras indisputably grapple. For example, in September, 2004, the Pittsburgh Symphony announced it would replace its departing music director with three positions entitled "artistic advisor," "principal guest conductor," and "guest conductor," each assuming varied responsibilities. Andrew Druckenbrod, *Pittsburgh Symphony Hires Trio to Lead in 2005*, PITTSBURGH POST-GAZETTE, Sept. 22, 2004, at A1. Although Andrew Davis, as artistic advisor, was slated to assume more responsibility than the other two positions, the chair of the search committee, which appointed him, announced that the committee "did not feel that any one person had the capability to meet the job or to provide the time for the job at this time."

traditional orchestra CBA presume the presence and involvement of a strong music director, so an absentee music director can result in the gridlock and stagnation of certain key functions.[28] One solution is to allocate powers traditionally held by a music director to other institutional players, including musicians.

C. The St. Paul Chamber Orchestra Agreement

1. The Process

The SPCO, a 35-musician ensemble, has been in existence since 1959.[29] With a grant from the Andrew W. Mellon Foundation,[30] the

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Id. Another search committee member, concertmaster Andres Cardenes, observed that "[t]he moniker music director has expectations that one human being cannot possibly fulfill." *Id*. The Pittsburgh Symphony and Davis will utilize a Programming Advisory Committee, comprised of three musicians and three managers to help "develop programming for future seasons." *Id*. (quoting Andrew Davis). The Baltimore Symphony Orchestra, during its search for a replacement for Music Director Yuri Temirkanov, reportedly considered a shift to a similar model before eventually appointing Marin Alsop as Music Director. Telephone Interview with Mary Plaine, Baltimore Symphony ICSOM Delegate (Oct. 24, 2004); *see also* Daniel J. Wakin, *Baltimore Hires Director over Objections of Musicians*, N.Y. TIMES, July 21, 2005, at E3. Although the post Alsop will fill is that of a "traditional" music director, her contract requires her to spend only fourteen weeks each season conducting the Baltimore Symphony. *Id*.

28. *See, e.g.*, Sarah Bryan Miller, *You're Not Fired!*, ST. LOUIS POST-DISPATCH, Nov. 21, 2004, at C3 (discussing the difficulty of removing symphony players in conformity with the CBA whose performance is below standard, particularly in the absence of a resident music director); *see also* Rochelle Gnagey Skolnick, Letter to the Editor, *Symphony Musicians*, ST. LOUIS POST-DISPATCH, Nov. 27, 2004, at 36 (responding to Miller's article and sharpening the focus on the problem of the absentee music director).

29. SPCO STRATEGIC PLAN, *supra* note 3, at 8. Although the institution traces its roots to 1959 and the founding of the Civic Philharmonic Society, it was not until 1968 that the Society accumulated the wherewithal to fund a full-time 22-member ensemble. Stephen Kelly, *St. Paul Chamber Orchestra*, *in* SYMPHONY ORCHESTRAS OF THE UNITED STATES: SELECTED PROFILES 199, 199 (Robert R. Craven ed., 1986). The SPCO has distinguished itself from the majority of American symphony orchestras on two counts: First, its small number of players relative to the ICSOM average of seventy-nine, ICSOM WAGE CHART, *supra* note 16, at 2, and second, its focus on three areas of the orchestral repertoire (the Viennese Classical School, Baroque music and "music of our time," defined as Twentieth Century and new music), SPCO STRATEGIC PLAN, *supra* note 3, at 17–18.

30. The Mellon Foundation, a New York non-profit corporation established in 1969, makes grants to symphony orchestras through its Music Program. The Andrew W. Mellon Foundation, History, http://www.mellon.org/MellonHistory.htm (last visited Mar. 28, 2006). The stated goals of the program are to help orchestras:

> Strengthen leadership within the organization; Develop a lively and diversified work environment that promotes job satisfaction throughout the organization and that taps

SPCO began a comprehensive Strategic Planning Process in September of 2000.[31] The goal of this process was to provide a long-term vision and strategy for the institution's next ten years, including its fiftieth anniversary in 2009.[32] Members of the board, staff, and orchestra participated in the process in roughly equal numbers.[33] The resulting document (the "Strategic Plan") included a vision statement, a statement of recommended program and financial initiatives, and a mandate for the creation of task forces to address certain issues facing the institution.[34]

Based on the perceived success of the Strategic Planning Process, the parties agreed to negotiate the renewal of their CBA through a similarly collaborative effort, hoping to codify much of what was articulated in the Strategic Plan.[35] Over the course of ten months and with the assistance of facilitators from the Symphony Orchestra Institute (SOI),[36] a body called the Contract Renewal Group first

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> the potential of musicians to act as artistic resources; Create a collaborative organizational culture that promotes alignment around common goals; Integrate artistic and institutional planning; Create coordinated programming across all activities of the organization that reflects and advances the organization's artistic aspirations and that contributes to the advancement of the art form; Develop strong bonds between the orchestra and its community.

The Andrew W. Mellon Foundation, Performing Arts, http://www.mellon.org/programs/performingarts/performingarts.htm (last visited Mar. 28, 2006).

In 2004, the Mellon Foundation awarded the SPCO a grant of $1.27 million. The Andrew W. Mellon Foundation, Grants, 2004, http://www.mellon.org/AnnualReports/2004/grants/Grants-Annual%20Report-2004.htm (last visited Mar. 28, 2006).

31. SPCO STRATEGIC PLAN, *supra* note 3, at 8, 38.

32. *Id*. at 8.

33. Coppock, *supra* note 2, at 1.

34. *See generally* SPCO STRATEGIC PLAN, *supra* note 3.

35. Boulian, *supra* note 2, at 55.

36. The SOI was a non-profit corporation founded in 1994 by Paul R. Judy and dissolved in March of 2005. Symphony Orchestra Institute, About the Institute, http://www.soi.org/about/ (last visited Mar. 28, 2006).

> Through programs of research, publications, forums, and education, the mission of the Symphony Orchestra Institute is to:
>
> - improve the effectiveness of symphony orchestra organizations;
> - to enhance the value they provide to their communities; and
> - help assure the preservation of such organizations as unique and valuable cultural institutions.

developed a methodology for the renewal process. Then, employing that methodology, it crafted an agreement designed to help make the Strategic Plan an operational reality.[37]

2. Substance

The resulting agreement includes several provisions that have stirred controversy and that present issues of genuine legal concern under American labor law.[38] The agreement creates two joint management-musician committees that bear responsibility for a range of institutional governance functions, including many that the NLRB and courts have consistently determined to be supervisory or managerial.[39]

For example, the Artistic Vision Committee's (AVC) mandate is to "set the overall artistic direction and strategies of the organization, working within the financial parameters established by the Executive Committee of the Society."[40] The AVC's responsibilities include programming of both the regular concert season and of educational activities, selecting conductors and guest artists, and "[o]rganizing ongoing discussion of the overall structure of the concert season, including, but not limited to, vacation weeks, number of performance weeks, performance venues, and series structure."[41] These are

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Paul R. Judy, *The Symphony Orchestra Institute—Precepts and Direction*, 1 HARMONY 1, 4 (1995), *available at* http://www.soi.org/harmony/archive/1/Precepts_direction_Judy.pdf. In March, 2005, the SOI transferred its assets to the Eastman School of Music to help establish an Orchestra Musician Forum at the school. Press Release, Eastman School Receives $1.2 Million to Establish Orchestra Musician Forum (Mar. 10, 2005), *available at* http://www.rochester.edu/Eastman/news/print.php?id=235.

37. Boulian, *supra* note 2, at 55. Although the process by which the agreement was reached is in itself controversial and worthy of discussion, that discussion is beyond the scope of this Note.

38. In addition to the provisions discussed in this Note, the Agreement involved an eighteen percent cut in wages and benefits for the musicians. Coppock, *supra* note 2, at 23. This wage reduction was part of overall organizational cuts made in response to funding shortfalls that became apparent during the renewal process. *Id*. at 21–22. One response to the reduction in wages was to include in the CBA a "Variable Additional Compensation Process." SPCO Agreement, *supra* note 1, at 7–8. This scheme provides for a distribution of funds to employees in the event the organization posts a positive net operating budget in a given season. *Id.*

39. *See infra* Part II.

40. SPCO Agreement, *supra* note 1, at 4.

41. *Id*. In the event the Society decides to engage a new music director, a Search Committee would be formed of the three musicians then serving on the AVC, two more

decisions traditionally made by the music director, artistic administration, and executive director, but occasionally with purely advisory input from musicians.[42] Although the AVC is expected to "work closely with" other committees, artistic leadership, and staff, the AVC is, according to the Agreement, "ultimately responsible and accountable for making artistic policy decisions."[43]

Another committee, the Artistic Personnel Committee (APC), administers the personnel provisions of the CBA.[44] The committee's duties include overseeing the audition process; guiding the tenure review process, including selecting members of a tenure review committee and awarding tenure to successful musicians; creating and implementing programs to provide both individual performance feedback and professional growth opportunities; designing an appropriate intervention process for musicians who fail to meet the orchestra's artistic standards; and recommending the dismissal of players for whom intervention was unsuccessful.[45] These activities depart from the traditional structure in which artistic personnel decision-making is vested in the music director, and in which musicians' roles are limited to serving on audition committees in an advisory or collaborative capacity or on "peer review" committees to

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musicians elected by their colleagues, and five individuals selected by the Society. *Id*. at 5. This committee would develop a list of suitable candidates and establish a selection process that would ensure candidates had conducted and been endorsed by the orchestra. *Id*.

42. *See supra* notes 16–22 and accompanying text.

43. SPCO Agreement, *supra* note 1, at 4. This conflicts with or renders meaningless provision C.1, which states:

> SOCIETY'S AUTHORITY
>
> Music performance, programming, educational policies and programming, as well as all musical preparations incident thereto, shall be under the ultimate control and direction of the Society, which shall have sole authority and discretion to establish artistic performance and educational standards, such discretion to be exercised in conformity with this Agreement.

Id. at 52. It also conflicts with the view of the orchestra's CEO, Bruce Coppock, who has reportedly asserted that he would veto a committee decision that was "totally unacceptable" to the management. E-mail from Herb Winslow, Orchestra Committee Chair, SPCO, to Rochelle Gnagney Skolnick (Oct. 31, 2004) (on file with author). Nowhere in the CBA is this veto power reflected. *Id*.

44. SPCO Agreement, *supra* note 1, at 5.

45. *Id*. at 5–6. As of April 17, 2006, both the Individual Feedback and Professional Growth processes were still under development. Telephone Interview with Leslie Shank, Orchestra Committee Chair as of May, 2005, SPCO (Apr. 17, 2006).

evaluate a music director's dismissal of another musician in a purely appellate capacity.[46]

Both the APC and the AVC are composed of three musicians and two members of management.[47] The method of selecting the musician members is the same for both committees.[48] One musician member is elected by the orchestra every two years.[49] A second musician is selected by the existing members of the committee for a two-year term.[50] The third musician is chosen from a list of volunteers and serves a one-year term.[51] One musician member of each committee is selected by the other committee members to serve as a voting member of the Society's Executive Committee.[52] Musicians serving on either the APC or the AVC receive eight service credits each concert season, or credit for the equivalent of approximately twenty hours of rehearsing or performing.[53]

In addition to the APC and the AVC, SPCO musicians also serve on audition, tenure review and dismissal review committees.[54] The eight-musician SPCO dismissal review committee, which is

46. *See supra* notes 16–22 and accompanying text.

47. SPCO Agreement, *supra* note 1, at 4–6.

48. *Id*.

49. *Id*.

50. *Id*. During the first year of the agreement, this position was filled, on a one-time basis, by election for a one-year term. *Id*.

51. *Id*. During the first year of the agreement, the volunteer member was chosen at random. In subsequent years, this position is to be filled from an ordered list of the remaining volunteers. Later volunteers are placed at the end of this waiting list. *Id*.

52. *Id*.

53. *Id*. at 5–6. Symphony orchestras use the term "service" to describe either a rehearsal or performance. Rehearsal services for the SPCO are generally two and one-half hours long; concerts are generally a maximum of two hours and ten minutes long. *Id*. at 23–26. SPCO musicians receive their annual salaries in exchange for being available to perform 240 services during the first three years of the contract, and 248 services in the last year. *Id*. at 22. Any musician who plays or is credited with more than that number receives additional pay at his or her individual service rate for each extra service. *Id*. The eight services credited to each player serving on the APC or AVC committees do not even begin to accurately reflect the amount of time the players actually spend discharging their committee responsibilities. Telephone Interview with Herb Winslow Orchestra Committee Chair, SPCO (Oct. 13, 2004). Although there is no mandatory contractual attendance policy for committee meetings, players who serve on committees "are expected to make their best efforts to attend meetings throughout the contract year." SPCO Agreement, *supra* note 1, at 4. The CBA does not provide for sanctions in the event that a committee member fails to faithfully perform his or her committee responsibilities. *Id*.

54. *Id*. at 11 (auditions); *id.* at 12–13 (tenure review); *id.* at 15–17 (dismissal review).

convened to hear appeals of musicians dismissed for non-musical reasons, is common to many symphony orchestras.[55] The SPCO audition committees depart from the norm in that they are composed entirely of musicians and bear full responsibility for evaluating candidates.[56] This level of autonomy is unique among ICSOM orchestras.[57] This independence extends even after hire, with decisions on a new player's tenure made by a tenure committee.[58] The CBA provides for the creation of a five-musician tenure review committee after the appointment of any new orchestra member.[59] This committee is charged with evaluating and advising the musician throughout his or her probationary term and with recommending to the APC to either deny or grant tenure or to extend the probationary period.[60]

In two provisions, the Agreement speaks to the potential legal consequences of the new roles assumed by musicians.[61] The first, "CONTRACT INTENT RELATIVE TO NLRB RE. [sic] YESHIVA," states that it is not the parties' intent to place the musicians outside the coverage of the NLRA by virtue of their assumption of functions which might be viewed as managerial or supervisory.[62] It also includes a limited waiver by the Society of its

55. ICSOM WAGE CHART, *supra* note 16, at 14. All but four of the ICSOM orchestras providing information on the subject reported having such an appellate committee to review artistic firings. *Id*.

56. SPCO Agreement, *supra* note 1, at 11–12; s*ee also* ICSOM WAGE CHART, *supra* note 16, at 13.

57. ICSOM WAGE CHART, *supra* note 16, at 13.

58. SPCO Agreement, *supra* note 1, at 12–14.

59. *Id.* at 13.

60. *Id*. at 12-14.

61. *Id*. at 65.

62. *Id*. The full provision provides as follows:

> E.15 CONTRACT INTENT RELATIVE TO NLRB RE.[sic] YESHIVA
>
> The parties hereto are fully cognizant of the holding of the U.S. Supreme Court in the matter of NLRB vs. Yeshiva University. It is not their intention to create a situation which would place the Musicians of this Orchestra in danger of losing their status as "employees" within the meaning of the National Labor Relations Act, by virtue of the assignment to them, collectively, of certain functions which might be viewed by the NLRB or by a court of competent jurisdiction, as "managerial" or "supervisory." Therefore, with regard to activities permitted or required by this Agreement, and deemed "managerial" or "supervisory", the Society specifically waives any right to claim any Musician is not an employee covered by the NLRA.

right to claim that any player is not a covered employee under the NLRA.[63]

> The only reason for the assignment of artistic leadership functions to the Musicians is that those functions bear a direct and important relationship to the artistic quality of the SPCO. As employees of the Society, the Musicians bring essential expertise to these artistic areas.

Id.

63. *Id*. The enforceability of this waiver in the face of the employer's repudiation is uncertain at best. A complete discussion of this question, while interesting, is beyond the scope of this Note. For purposes of this Note, I assume the waiver would have no effect on the NLRB's statutorily-conferred power and duty to determine an appropriate bargaining unit.

Bargaining unit determinations are exclusively the province of the NLRB. 29 U.S.C. § 159(c) (2005); Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 152 (1941); *see also* Douds v. Int'l Longshoremen's Ass'n, 241 F.2d 278, 282 (2d Cir. 1957) (holding that the NLRB is not only empowered, but "indeed directed, to decide what is the appropriate bargaining unit in each case"). In *Douds*, the Second Circuit affirmed a district court's order enjoining a union from insisting on a bargaining unit different from that approved by the NLRB. *Id*. at 282–83, 285. Necessarily included in the NLRB's determination of what constitutes an appropriate bargaining unit is its determination of which members of an employer's workforce are statutory employees, and which are supervisors or managers and, therefore, excluded from the Act's coverage. *See, e.g.*, NLRB v. Yeshiva Univ., 444 U.S. 672, 674–75 (1980) (involving an employer opposed certification of union as bargaining representative on the ground that the bargaining unit the union sought to represent was composed of managerial or supervisory personnel who were not entitled to employee status under the Act).

The NLRB's singular power to determine employee status also arises when an employer defends itself against an allegation of unfair labor practices. The employer will often claim that the NLRB has no jurisdiction to decide the matter because the affected workers are not statutorily-protected employees. *See, e.g.*, NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 574–75 (1994) (involving an employer that defended unfair labor practice charge with argument that disciplined nurses were supervisors not entitled to protection). Even where both the employer and union agree that a given employee is not a supervisor, the NLRB may exercise its authority to decide otherwise. *See, e.g.*, Jeffrey Mfg. Co., 208 N.L.R.B. 75, 79–81 (1974) (ruling that union president was also company supervisor despite objections and testimony of both union and employer).

The NLRB will also enforce waivers of certain statutory rights by both unions and employers when the waiver is "clear, knowing, and unmistakable, whether they be by contractual provision or by conduct." N. Pac. Sealcoating, Inc., 309 N.L.R.B. 759, 759 (1992); *see also* Metro. Edison Co. v. NLRB, 460 U.S. 693, 705–07 (1983). In *Northern Pacific Sealcoating*, the NLRB observed that it was "reluctant to permit parties to use Board processes in a manner contrary to their contractual commitments or obligations." 309 N.L.R.B. at 760. To "lend government sanction to undo the terms of a bargain which the parties themselves had struck . . . would be contrary to the statutory policy directed toward stabilizing the collective-bargaining relationship." *Id*. On the strength of that rationale, the NLRB's refusal to enforce the waiver provision against the SPCO management would run contrary to the NLRA's stated goal of promoting labor peace:

> It is declared hereby to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and

In the second provision, the Society indemnifies and holds harmless not only the members of the APC and the AVC committees, but also the local union, the AFM, and the elected members of the musicians' bargaining committee.[64] These entities are indemnified against any liability incurred in the discharge of their committee responsibilities and against a claim for unemployment compensation benefits.[65] Indemnity applies regardless of the legal theory asserted against the indemnitee.[66]

II. CASE LAW

A. Defining Supervisors and Managers

The NLRA covers professional employees,[67] but section 2(3) of the Act expressly excludes "any individual employed as a supervisor"

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procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (2005).

64. SPCO Agreement, *supra* note 1, at 65. This provision provides as follows:

E.16 INDEMNIFICATION

The Society shall indemnify and hold harmless (a) all members of the Artistic Vision Committee, the Artistic Personnel Committee, and/or the Executive Committee, (b) the Twin Cities Musicians Union Local #30–73, the American Federation of Musicians and the officers and representatives of said unions, and (c) the elected members of the SPCO musicians' bargaining committee, from any and all liability, loss, costs, damage or expense (including attorneys' fees) which such indemnities may incur or sustain, arising from the committee member's discharge of their committee responsibilities or from any claims for benefits under Minnesota Statutes Section 268.192, Subd. 1, asserted by an SPCO musician governed by this collective bargaining Agreement. Said indemnity shall apply to such claims regardless of the legal theory asserted (including negligence, breach of fiduciary duty, failure to provide fair representation, equitable estoppel, breach of express or implied contract, violation of state or federal statute or regulation), but only if, as to each indemnitee described in (a) above, said indemnitee did not act dishonestly or in bad faith or in willful violation of the law. The Society shall have the right, but not the obligation, to select counsel and control the defense and settlement of any action against the indemnities should such need arise.

Id.

65. *Id*.

66. *Id*.

67. 29 U.S.C. § 152(12) (2005). A professional employee is defined as:

from its protections.[68] The Act further defines a supervisor as "any individual having authority, in the interest of the employer," to engage in one of twelve enumerated functions, including hiring, discharging, or disciplining other employees, or "recommend[ing] such action, if . . . the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."[69] The same loyalty concerns that led Congress to statutorily exclude supervisors[70] also led the NLRB and courts to establish a judicial exclusion for managerial employees who develop and implement the policies of the employer.[71]

> a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

Id.

68. *Id.* § 152(3).

69. *Id.* § 152(11). The full text of the provision provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Id.

70. In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), the Court cited the legislative history behind the Taft-Hartley amendments' explicit exclusion of supervisors from the Act's coverage as "strongly suggest[ing] that there were also other employees, much higher in the managerial structure, who were likewise regarded as *so clearly outside the Act* that no specific exclusionary provision was thought necessary." *Id*. at 283 (emphasis added).

71. *See, e.g.*, NLRB v. Yeshiva Univ., 444 U.S. 672, 682 (1980) (defining managerial employees as "those who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer'" (quoting *Bell Aerospace*, 416 U.S. at 288)).

1. The Managerial Exclusion

NLRB v. Bell Aerospace Co. is the United States Supreme Court's seminal articulation of the managerial exclusion.[72] In this case, the Court upheld the appellate court's decision to deny enforcement of an NLRB order to bargain.[73] At issue was the status of the company's buyers, who the NLRB determined to be an appropriate bargaining unit.[74] The NLRB reached this conclusion even though it also accepted the company's contention that the buyers were managerial,[75] because it believed that there was no conflict of interest between the buyers' jobs and their participation in a labor organization.[76] Rejecting the NLRB's conflict of interest standard,[77] the Court asserted that Congress intended to exclude *all* managerial employees, and remanded the case so that the NLRB could determine whether the buyers were in fact managerial.[78] The standard adopted by the NLRB on remand and later endorsed by the courts defined managerial employees as those who "formulate and effectuate management policies by making operative the decisions of their employer."[79] Any employee who meets this standard is outside the coverage of the Act.[80]

72. 416 U.S. 267.

73. *Id*. at 295. The NLRB rejected the company's contention that buyers who were also union members might be tempted to favor union interests in the exercise of their "authority to commit the company's credit, select vendors, and negotiate purchase prices." *Id*. at 271. Finding any possible conflict of interest "unsupported conjecture," the NLRB asserted that the buyers' latitude was circumscribed by the employer and that "'any possible temptation to allow sympathy for sister unions to influence such decisions could effectively be controlled by the Employer.'" *Id*. (quoting Bell Aerospace Co., 190 N.L.R.B. 431, 431 (1971)).

74. *Id.* (citing *Bell Aerospace*, 190 N.L.R.B. at 431).

75. *Id.* at 270–71.

76. *Id.* at 271–72.

77. In an order denying reconsideration of its original decision, the NLRB explained that the "fundamental touchstone" when determining whether a managerial employee should be excluded from the Act's protection was "whether the duties and responsibilities of any managerial employee . . . do or do not include determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization." Bell Aerospace Co., 196 N.L.R.B. 827, 828 (1972).

78. *Bell Aerospace*, 416 U.S. at 289–90.

79. *Id*. at 288 (quoting Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320, 323 n.4 (1947)).

80. *Id*. at 289–90.

Six years later, the Court added depth to its managerial exclusion when it held in *NLRB v. Yeshiva University* that faculty who participated in forming and implementing University policies were excluded from coverage.[81] The NLRB rejected the University's assertion that the faculty were managerial and concluded that, as professional employees, they were entitled to protection under the Act.[82] The NLRB rested this conclusion on its assessment that the faculty exercised its decision-making authority on a "'collective rather than individual basis,'" that the faculty acted in their own interest rather than the employer's, and that final authority rested with the University's board of trustees.[83] In arguments before the Court, the NLRB abandoned the first and third of these rationales, leaving the Court to consider only the second—whether it was enough that the faculty acted in their own interest.[84]

The Court, emphasizing a record replete with examples of the faculty's authority in many facets of governance,[85] found that the faculty's interests in this context were in fact inseparable from the University's.[86] The faculty's reliance on their professional judgment

81. 444 U.S. 672, 679 (1980).

82. *Id.* at 678.

83. *Id*. (quoting Yeshiva Univ., 221 N.L.R.B. 1053, 1054 (1975)). The Court offered a scathing assessment of the NLRB's three-part rationale as merely "a litany to be repeated in case after case" by the NLRB when dealing with university faculty. *Id.* at 685. The Court also repeatedly emphasized the NLRB's failure to make findings of fact. *Id*. at 678–79, 691. In contrast, the dissent emphasized the Board's examination of the "voluminous record" in the case, noting that it was developed over five months of hearings and comprised more than 4600 pages of testimony and 200 exhibits. *Id*. at 696 and n.5 (Brennan, J., dissenting). Justice Brennan's dissent was joined by Justices White, Marshall and Blackmun. *Id*. at 691.

84. *Id*. at 685.

85. The faculty engaged in university-wide governance through participation on two elected committees: a student-faculty advisory council and a Faculty Review Committee, whose recommendations to the President or Dean for the adjustment of faculty grievances were also purely advisory. *Id*. at 675–76. Within individual schools, the faculty were responsible, through both formal and informal processes, for effective determination of "curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules." *Id*. at 676. Faculty also made recommendations, the "overwhelming majority" of which were implemented, with regard to faculty employment status, including hiring, tenure, promotion and termination. *Id*. at 677. The Court agreed with the appellate decision, which found that although they acted in a nominally advisory capacity, the faculty were "'in effect, substantially and pervasively operating the enterprise.'" *Id*. at 691 (quoting NLRB v. Yeshiva Univ., 582 F.2d 686, 698 (2d Cir. 1978)).

86. *Id.* at 688. The Court asserted that the "quest for academic excellence and institutional distinction" was an administrative policy to which the University expected the faculty to

did not preclude their alignment with management.[87] Indeed, the Court reasoned that the divided loyalty concerns, which prompted the managerial and supervisory exclusions, would only be exacerbated if the faculty were able to enjoy a high degree of independence in their exercise of judgment.[88] Fundamentally, *Yeshiva* holds that an employee who is "aligned with management" warrants managerial exclusion.[89]

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adhere. *Id*. Inquiry into whether this policy created an expectation of conformity to a goal of a personal or a professional nature was "fruitless" when the two goals were "essentially the same." *Id*.

87. *Id*.

88. *Id*. at 689–90. "The university *requires* faculty participation in governance because professional expertise is indispensable to the formulation and implementation of academic policy . . . . It is clear that Yeshiva and like universities *must rely* on their faculties to participate in the making and implementation of their policies." *Id*. at 689 (emphasis added) (footnote omitted). The Court also noted that the extent to which faculty recommendations were implemented was "no 'mere coincidence,'" as suggested by the dissent. *Id*. at 690 n.28 (quoting *id.* at 701 (Brennan, J., dissenting)). "Rather this is an inevitable characteristic of the governance structure adopted by universities like Yeshiva." *Id*.

89. *Id.* at 683 ("Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.") (footnote omitted).

It is worth noting that the Court disavowed any attempt to remove *all* professionals from the Act's coverage through the managerial exclusion. *Id*. at 690 ("We certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them."). In dicta, the Court cited with approval a number of NLRB decisions in which decision-making "limited to the *routine discharge* of professional duties in projects to which they have been assigned" did not exclude a professional from coverage even if divided loyalty was arguably a concern. *Id*. (emphasis added); *see also id.* at 690 n.30 (mentioning among the non-excluded professions architects, engineers, nurses, and broadcast newswriters). The Court noted that the NLRB had developed a test specific to the health care industry that questioned whether allegedly managerial decisions were in fact "incidental to" or "in addition to" the professionals' treatment of patients. *Id.* at 690. The Court determined that Congress had "expressly approved" this test in hearings for the 1974 amendments of the Act. *Id*.

However, the Court's approval of this test did not last. *See* NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 576–78 (1994) (rejecting NLRB's application of an "incidental to" patient treatment test for supervisory decisions of nurses). The *Health Care* court also rejected the NLRB's reliance on legislative history for justification, reversing its *Yeshiva* position that the NLRB had developed a consistent test prior to the amendments and testily asserting that "'[i]t is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means.'" *Id*. at 582 (quoting Pierce v. Underwood, 487 U.S. 552, 566 (1988)).

Apparently drawing on the distinction, spelled out in the supervisory exclusion in 29 U.S.C. § 152(11), that an employee is a supervisor if his or her exercise of authority is "not of a merely routine or clerical nature, but requires the use of independent judgment," the *Yeshiva*

2. The Supervisory Exclusion

The supervisory exclusion in section 2(11) of the NLRA provides a three-part test to determine if an employee is a supervisor.[90] The first part requires a determination as to whether the employee has authority to engage in any of the twelve statutorily specified activities discussed previously.[91] This is a straightforward factual inquiry. The second and third parts of the test require interpretation of the statute's two modifying phrases. The first, which the Supreme Court considered in *NLRB v. Health Care & Retirement Corp. of America*, asks whether an employee's exercise of authority is undertaken "in the interest of the employer."[92] The second asks whether the exercise of that authority requires the use of "independent judgment," and was clarified by the Court in *NLRB v. Kentucky River Community Care, Inc*.[93]

In *Health Care*, the Court found that the NLRB created a false dichotomy when it distinguished between acts a nurse undertook in connection with patient care and those she undertook in the interest of her employer, a nursing home.[94] In a hearing before an administrative law judge (ALJ) on a complaint alleging that the employer had improperly disciplined four staff nurses, the employer argued that the nurses were supervisors and therefore not protected by the NLRA.[95] The nurses, who were the senior ranking employees at the nursing home seventy-five percent of the time, were responsible for ensuring adequate staffing and distribution of daily work assignments; overseeing the nurse aides' work, including grievance resolution, discipline, and performance evaluations; and

court asserted that an employee is only aligned with management if his or her activities fall "outside the scope of the duties *routinely performed* by similarly situated professionals." 444 U.S. at 690 (emphasis added). However, the Court's subsequent decisions call into question the validity of this test. *See, e.g.*, *Health Care*, 511 U.S. at 580 (criticizing the NLRB's statutory dichotomy).

90. *Health Care*, 511 U.S. at 573–74.

91. *Id*. at 574; *see also* 29 U.S.C. § 152(11) (2005), quoted *supra* note 69.

92. *Health Care*, 511 U.S. at 574.

93. 532 U.S. 706 (2001).

94. *Health Care*, 511 U.S. at 577. The Court compared this dichotomy to the one the Board created in *Yeshiva*, *see supra* note 85 and accompanying text.

95. *Health Care*, 511 U.S. at 575.

reporting to management.[96] The ALJ found that because the nurses were primarily concerned with the residents' well-being, they did not perform their supervisory work "in the interest of the employer."[97] The NLRB agreed with the ALJ,[98] but the Sixth Circuit reversed;[99] the Supreme Court affirmed the Sixth Circuit's reversal.[100] Observing that "[p]atient care *is* the business of a nursing home," the Court declared that even if direction of subordinates was only incidental to caring for patients (who were, after all, the employer's customers), it was still undertaken "in the interest of the employer."[101]

The Court acknowledged, as it had in *Yeshiva*, that inherent in the Act was "some tension" between the coverage of professional employees and the exclusion of supervisors; however, the Court refused to permit the NLRB to resolve that tension by "distorting the statutory language."[102] The Court reminded the NLRB that the statute's supervisory exclusion applies to professionals and non-professionals alike, even though professionals may be more apt to take on supervisory responsibilities.[103] Any attempt on the part of the NLRB to "creat[e] legal categories inconsistent with [the Act's] meaning" is an impermissible method of enforcement.[104]

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96. *Id*. The staff nurses at issue were licensed practical nurses. *Id.* at 574–75. There were also registered nurses among the nine to eleven staff nurses. *Id.* Subordinate to them were between fifty and fifty-five nurses' aides. *Id*.

97. Health Care & Ret. Corp. of Am., 306 N.L.R.B. 63, 68, 70 (1992).

98. *Id*. at 63 n.1.

99. Health Care & Ret. Corp. of Am. v. NLRB, 987 F.2d 1256 (6th Cir. 1993). The Sixth Circuit previously found the NLRB's test for determining the supervisory status of nurses to be inconsistent with the statute. *See* Beverly Cal. Corp. v. NLRB, 970 F.2d 1548, 1556 (6th Cir. 1992); NLRB v. Beacon Light Christian Nursing Home, 825 F.2d 1076, 1079–80 (6th Cir. 1987).

100. *Health Care*, 511 U.S. at 584. The Supreme Court's grant of *certiorari* in *Health Care* was intended to resolve a conflict among the circuits regarding the validity of the NLRB's rule. *Id.* at 576.

101. *Id*. at 577 (emphasis added). The Court returned to a definition of the phrase "in the interest of the employer" that it had developed almost fifty years earlier in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 488 (1947) ("Every employee, from the very fact of his employment in the master's business, is required to act in his interest."). *Health Care*, 511 U.S. at 578. In *Packard Motor*, the Court adopted an interpretation consistent with the ordinary meaning of the phrase and held that it encompassed acts undertaken within the scope of employment or on the employer's authorized business. *Packard Motor*, 330 U.S. at 488–89.

102. *Health Care*, 511 U.S. at 581.

103. *Id*.

104. *Id*. at 580.

In *Kentucky River*, the Court rejected another attempt by the NLRB to create a categorical exemption, this time from the "independent judgment" prong of the supervisor test.[105] The NLRB found that six registered nurses were not supervisors because their direction of less-skilled employees was an exercise of "ordinary professional or technical judgment."[106] Therefore, it was not an exercise of "independent judgment" as required by the statute.[107] Expressing approval for prior NLRB decisions that turned on the *degree* of discretion in an employee's exercise of "independent judgment,"[108] the Court found that in this case, the NLRB abandoned the degree test and improperly adopted an unwarranted categorical exclusion for ordinary professional or technical judgment.[109] Further, the NLRB inexplicably confined its application of the new test to only one of the twelve supervisory functions: "responsibly to direct."[110] The Court found that neither of these limitations was justified by the text of the Act.[111] Moreover, the NLRB's attempt to preserve coverage for professional employees by developing a unique standard for assessing their exercise of independent judgment was inconsistent with the *Health Care* court's policy of applying the test for supervisory status similarly to both professional and non-professional employees.[112]

B. Joint Employer-Employee Governance Committees

Section 8(a)(2) of the NLRA declares employer-dominated labor organizations to be an unfair labor practice on the part of the

105. NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 721 (2001).
106. *Id*. at 713.
107. *Id*. at 709, 713.
108. *Id*. at 713–14 (citing Chevron Shipping Co., 317 N.L.R.B. 379, 381 (1995); Weyerhaeuser Timber Co., 85 N.L.R.B. 1170, 1173 (1949)).
109. *Ky. River*, 532 U.S. at 714. With the creation of a categorical exclusion, the Court asserted, "[l]et the judgment be significant and only loosely constrained by the employer; if it is 'professional or technical' it will nonetheless not be independent." *Id*. (footnote omitted). If the NLRB was allowed to apply the "professional or technical judgment" standard to the exercise of every supervisory task, the result would be the virtual elimination of the existence of a supervisory class from the Act. *Id*. at 715.
110. *Id*. at 715–16.
111. *Id*. at 716.
112. *Id*. at 721.

employer.[113] This prohibition is based in Congress' concern over the employer practice of creating a sham "company union" to circumvent their employees' efforts to obtain meaningful representation.[114] These sham unions were common at the time of the Act's passage and created the illusion of representation. In reality, they allowed employers to retain ultimate control over the employment relationship and undermined the employees' ability to freely choose their own representatives.[115] In the modern era, "employee participation" programs, which allow for employer-employee cooperation, have raised new challenges for the NLRB and courts when deciding cases of alleged section 8(a)(2) violations.[116]

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113. 29 U.S.C. § 158(a)(2) (2005). The statute provides:

> It shall be an unfair labor practice for an employer-
>
> . . . .
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

Id.

114. JULIUS G. GETMAN ET AL., LABOR MANAGEMENT RELATIONS AND THE LAW 342 (2d ed. 1999).

115. *Id*. While these sham unions took many different forms, including "representation plans," "shop committees" and "communications programs," they were all initiated and controlled by company management and acted solely in an advisory capacity. *Id.* Management always retained ultimate decision-making authority. *Id*.

116. *See, e.g.*, Naomi Knitting Plant, 328 N.L.R.B. 1279 (1999). In *Naomi Knitting*, the NLRB affirmed an ALJ's order for the disestablishment of a company-dominated "Design Team" that had been created in the wake of a failed union organizing drive. *Id*. at 1279. The ALJ's decision acknowledged that there was "[n]o doubt" that "both management and employees at Naomi have benefited from the communication and results achieved through the Design Team as it has been created, structured, and operated." *Id*. at 1301. Nonetheless, "[t]he remedy for domination is an order to disestablish." *Id*.; *see also* GETMAN, *supra* note 114, at 348–53.

A 1994–95 study of worker preferences showed that the majority of American workers want greater workplace participation and cooperative relationships with management. RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 4–5 (1999) (reporting the results of the authors' Worker Representation and Participation Study). At the same time, the majority of workers favor a "measure of independence and protection of that independence in their dealings with management." *Id*. at 5. Specifically, workers want "significant independence" in selecting their own representatives to participate in joint decision-making. *Id*.

Workers' focus on maintaining a voice not dominated by their employers echoes legal concerns that a relaxation of the protections afforded by section 8(a)(2) would result in a "diminution of the bargaining power and effectiveness of lawfully-recognized unions." Robert

To prove that a joint employer-employee committee violates section 8(a)(2), a petitioner must first show that the committee is a "labor organization" within the meaning of section 2(5).[117] This inquiry is tripartite, requiring 1) employee participation with 2) a purpose, at least in part, of "dealing with" the employer over 3) "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."[118] Once the committee is shown to be a labor organization, the petitioner must then demonstrate that the employer has dominated or interfered with the committee's formation or administration or has otherwise impermissibly supported the committee in violation of section 8(a)(2).[119]

B. Moberly, *The Worker Participation Conundrum: Does Prohibiting Employer-Assisted Labor Organizations Prevent Labor-Management Cooperation?*, 69 WASH. L. REV. 331, 355 (1994). Although Moberly acknowledges that section 8(a)(2) has largely accomplished Congress' goal of eliminating traditional company unions, he argues that it is still valuable. *Id*. at 345–46. In the absence of section 8(a)(2) strictures, an employer could use a cooperative committee "to place mandatory subjects of bargaining before company-dominated groups." *Id*. at 355. In that scenario, the company avoids dealing with the employees' legitimate representative, and that representative, the union, is further weakened and marginalized. *Id*.

117. 29 U.S.C. § 152(5) (2005). The NLRA defines "labor organization" as:

> [A]ny organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Id.

118. *Id*.

119. Electromation, Inc., v. NLRB, 35 F.3d 1148, 1157–58 (7th Cir. 1994). The usual remedy for employer domination of a labor organization in violation of section 8(a)(2) is an order to disestablish. PATRICK HARDIN ET AL., THE DEVELOPING LABOR LAW 2520 (4th ed. 2002). Where an employer has not dominated but has merely provided improper assistance to a union, the NLRB may order the employer to withdraw recognition of the union until it receives proper NLRB certification. *Id*.; *see also* Chi. Rawhide Mfg. Co., 105 N.L.R.B. 727, 737 (1953), *enforcement denied on other grounds*, 221 F.2d 165 (7th Cir. 1955) (holding that where employer "assisted, contributed support to, and interfered with the administration of" but did not dominate employee association, the proper remedy was an order to withdraw recognition pending certification and to cease giving effect to CBA with the association). Where an employer has merely improperly influenced the negotiation of a CBA with a union whose majority status is not in doubt, the NLRB may order the CBA set aside and bar the employer from further interference in the administration of the union. Jeffrey Mfg. Co., 208 N.L.R.B. 75, 75 (1974). In *Jeffrey*, the ALJ determined and the NLRB confirmed that the union president was also a company supervisor, despite the fact that both company and union denied his supervisory status. *Id*. at 79. The ALJ found that "'[s]uch a mingling of supervisory and employee-representative function . . . denied the Respondent's employees their rights under the Act to be represented in collective-bargaining matters by individuals who have a single-minded loyalty to their interest'" and violated section 8(a)(2). *Id*. at 83 (quoting E.E.E. Co., Inc., 171

1. Labor Organization: "Dealing with" the Employer

Two parts of the test to determine if a committee is a labor organization, employee participation and the subject matter discussed by the committee, are straightforward factual inquiries.[120] The Supreme Court mandates a broad interpretation of the phrase "dealing with" in determining whether a committee's activities bring it within the section 2(5) definition of a labor organization.[121] In its

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N.L.R.B. 982 (1968)); *see also* Vanguard Tours, Inc., 300 N.L.R.B. 250, 250 (1990), *enforced in part and denied in part*, 981 F.2d 62 (2d Cir. 1992) (holding that employer violated section 8(a)(2) "by maintaining a system whereby shop stewards who performed the function of grievance representative for the Union, and who submitted bargaining demands and participated in negotiations on behalf of the Union, were supervisors of the very employees they were supposed to represent").

120. While employee participation should be readily discerned, the NLRB and courts have been tempted to complicate the inquiry by suggesting that employees participating in committees must be acting as representatives. *See, e.g.*, Electromation, Inc., 309 N.L.R.B. 990, 1002 (1992) (Devaney, Member, concurring) ("[C]ontrary to my colleagues, I would not be inclined to find that an employee group constituted a statutory labor organization unless the group acted as a representative of other employees.").

See also NLRB v. Webcor Packaging, Inc., 118 F.3d 1115, 1120–21 (6th Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998). In *Webcor*, the Sixth Circuit rejected the employer's argument that a plant council was not a labor organization because it was merely a suggestion forum, rather than a representative body. *Id.* The court found instead that the employees on the council *did* represent other employees. *Id*. Asserting that the NLRB had not determined whether an employee group could meet the statutory definition of a labor organization if it was not representative, the court found that its factual determination had saved it from having to address this "novel legal question." *Id*. at 1120.

For a more thorough interpretation of section 2(5), see *Electromation*, 309 N.L.R.B. at 1007 n.13 (Raudabaugh, Member, concurring). Member Raudabaugh dismissed the argument that representation should be an "additional defining characteristic" of a labor organization. *Id.* In his view, an "employee representation committee or plan" is named in section 2(5) as just one type of entity that may be a labor organization. *Id.* He pointed out that "[t]he term 'representation' does not modify the other entities listed in the statutory definition and does not appear in the latter part of the definition along with 'participation' and 'dealing with.'" *Id*. This view of the "employee representation committee," as a distinct type of labor organization, is bolstered by the fact, exposed by Member Devaney, that "employee representation plan" was used in legislative committee testimony before the passage of the NLRA's predecessor, the National Industrial Recovery Act, "as a term of art to describe scores of organizations." *Id.* at 999–1000 (Devaney, Member, concurring) (citing *Hearing on S. 2926 Before the S. Comm. on Education and Labor*, 73d Cong., 2d sess., *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 1546–52 (1959) [hereinafter LEGISLATIVE HISTORY]). These representation plans were so numerous and varied (covering over a million employees by 1934) that the phrase "employee representation committees" was inserted into the text of the statute expressly as a way of capturing their full scope. *Electromation*, 309 N.L.R.B. at 1000 (Devaney, Member, concurring).

121. NLRB v. Cabot Carbon Co., 360 U.S. 203, 210–12 (1959).

1959 decision in *NLRB v. Cabot Carbon Co.*, the Court held that the Fifth Circuit had erred in interpreting the "dealing with" requirement of section 2(5) as synonymous with the more limited concept of "bargaining with" an employer.[122] Citing the statute's plain language, its legislative history, and its subsequent judicial interpretation, the Court found no support for the Fifth Circuit's narrow reading of the phrase.[123] Even though the employee committees in *Cabot Carbon* had not negotiated a formal collective bargaining agreement with their employer, the Court held that the committees dealt with the employer in the requisite manner.[124] The committees handled grievances and made proposals to the employer regarding matters including work schedules, wages, and working conditions.[125] These activities, according to the Court, constituted "dealing with" the employer for purposes of section 2(5).[126]

The requirement of "dealing with" the employer was further defined in one of the two recent cases that attempted to flush out the boundaries of section 8(a)(2).[127] In *Electromation v. NLRB*, the Seventh Circuit enforced the NLRB's order for the disestablishment of several "action committees."[128] The employer created the committees to address employee discontent over the employer's unilateral decision to change certain aspects of company policy.[129] The committees, which included both employees and members of management, met to discuss means of improving worker satisfaction and presented proposals based on these discussions to the company's management.[130] Management then had the option of responding to the

122. *Id*. at 212–13.

123. *Id*. at 210. The Court noted that Congress expressly rejected an amendment to the original legislation which would have substituted the term "bargaining collectively" for "dealing." *Id*. at 211 (citing *Hearing on S. 1958 Before the S. Comm. on Education and Labor*, 74th Cong. 66–67, *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 120, at 1442–43). The Court also cited judicial interpretation of section 2(5) both before and after the Taft-Hartley amendments. *Id*. at 212 n.11, n.14.

124. *Id.* at 212-13.

125. *Id.* at 207–08.

126. *Id*. at 213–14.

127. Electromation, Inc. v. NLRB, 35 F.3d 1148 (7th Cir. 1994).

128. *Id.* at 1151.

129. *Id*.

130. *Id*. at 1152–53.

committees' proposals.[131] The Seventh Circuit cited with approval the NLRB's definition of "dealing with" as a "bilateral mechanism," wherein proposals from the committee concerning conditions of employment receive "real or apparent consideration" from management.[132]

In the second recent case regarding section 8(a)(2), *E.I. du Pont de Nemours & Co.*, the NLRB explained that a "bilateral mechanism" normally involves a "pattern or practice" of the employee committees' presentation of proposals to management.[133] Management could then either accept or reject the proposals without engaging in the kind of compromise that typifies bargaining.[134] *Du Pont* involved six safety committees and one fitness committee, all of which included both employees and members of management.[135] Decisions were made by consensus of *all* the members of a given committee.[136] Noting that discussion took place between employees and management within each committee, the NLRB found that the managers' capacity to reject employee proposals from within the committees was "only a difference of form," rather than of substance, from the kind of "dealing with" management that would have occurred had the managers rejected committee proposals from outside the committee structure.[137]

2. Labor Organization: Employer Domination

An employer may impermissibly dominate either the formation or administration of an employer-employee committee.[138] Although Congress has not provided a complete list of the ways in which an

131. *Id*. at 1152.

132. *Id*. at 1161 (citing Electromation, Inc., 309 N.L.R.B. 990, 995 n.21, 997–98 (1992)).

133. 311 N.L.R.B. 893 (1993).

134. *Id*. at 894.

135. *Id.* at 893.

136. *Id.* at 895. This process was outlined in du Pont's Personal Effectiveness Process (PEP) handbook: "'[C]onsensus is reached when all members of the group, including its leader, are willing to accept a decision.'" *Id*. This process effectively gave the management member(s) of any committee veto power over any employee proposal. *Id*.

137. *Id*. ("As a practical matter, if management representatives can reject employee proposals, it makes no real difference whether they do so from inside or outside the committee.").

138. 29 U.S.C. § 158(a)(2) (2005).

employer might dominate such an organization, it has suggested several possibilities: employer determination of or control over the structure of the committee, employer participation in the committee's internal management or elections, or employer control over the agenda or procedure of committee meetings.[139]

In *Electromation*, the employer both unilaterally imposed the "action committees" on its employees and determined the purposes of the committees.[140] The employer also set the number of employees that could participate in each committee and designated the members of management who would serve.[141] These members of management determined whether any of the committees' proposals would be presented to upper management.[142] The influence of the employer, including its financial and logistical support of the committee meetings, provided sufficient evidence to support the NLRB's finding of employer domination and interference.[143]

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139. S. COMM. ON EDUCATION AND LABOR, NATIONAL LABOR RELATIONS BOARD, S. REP. NO. 573, at 10 (1935), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 120, at 2309–10. After listing several possible forms of interference, the Report acknowledges:

> It is impossible to catalog all the practices that might constitute interference, which may rest upon subtle but conscious economic pressure exerted by virtue of the employment relationship. The question is one of fact in each case. And where several of these interferences exist in combination, the employer may be said to dominate the labor organization by overriding the will of the employees.

Id.

140. Electromation, Inc. v. NLRB, 35 F.3d 1148, 1151–52 (7th Cir. 1994). The employees were not initially positive about the committees: "The employees did not want more meetings or committees; rather, they wanted solutions to the numerous problems they had identified." *Id*. at 1152. It was only when it became clear that the committees were the only solution the employer was willing to consider that the employees agreed to participate. *Id*. In the end, the employer chose not to create a committee to address one of the issues about which the employees were most seriously concerned—the lack of a wage increase. *Id*. at 1169.

141. *Id*. at 1152. Additionally, after posting sign-up sheets for employees to volunteer for committee service, Electromation refused to allow two employees who had signed up for multiple committees to serve on more than one. *Id.* After initially announcing that the volunteers for a given committee would decide who would serve, the employer made a unilateral determination without giving the employees an opportunity to vote on the members. *Id*.

142. *Id*. at 1170. The court noted that this "effectively put the employer on both sides of the bargaining table." *Id.*

143. *Id*. Electromation compensated committee members for their service and provided the committees with supplies and meeting space. *Id.* Both the Board and the court were careful to point out that compensating employees for time spent on committees was not *per se* a violation of section 8(a)(2). Electromation, Inc., 309 N.L.R.B. 990, 998 n.31 (1992); *Electromation*, 35

Similarly, in *du Pont*, the NLRB held that the employer's veto power over committee actions, its role in the establishment of each committee's agenda, its control over both the number and selection of employees to serve on the committees, and its ability to "change or abolish any of the committees at will" cumulatively established the employer's domination over the administration of the committees.[144]

3. Joint Committees that Perform Managerial Functions

Where a joint employer-employee committee merely assumes duties that are essentially managerial or supervisory, the NLRB has not held the committee to be violation of section 8(a)(2).[145] In *Crown Cork & Seal Co.*, the employer used a management system that delegated authority to employees through committees and teams of various types.[146] The four thirty-three-member Production Teams, labeled A, B, C, and D, included the majority of the plant's approximately 150 employees; one member of each team was a member of management.[147] These teams had authority to "decide and do" with regard to such workplace issues as "production, quality, training, attendance, safety, maintenance, and discipline short of suspension or discharge."[148] This included the authority to stop production lines, recall damaged shipments, and investigate and correct safety problems. The teams also scheduled employee training

F.3d at 1170 (citing Chi. Rawhide Mfg. Co. v. NLRB, 221 F.2d 165, 170 (7th Cir. 1955)).

144. E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 895–96 (1993). The company controlled the committees' agendas through the management members of the committees, who served as either the committee leader or the "resource" (defined as a monitor or advisor). *Id*. at 896. Du Pont's PEP handbook, which guided the committees' activities, provided that the leader, resource, and a scribe would confer before and after each meeting to set the meeting agenda and then evaluate the meeting and plan improvements for the next meeting. *Id*. at 895 n.15.

145. Crown Cork & Seal Co., 334 N.L.R.B. 699, 699 (2001); *see also* Ga. Power Co., 10-CA-33361, 2004 N.L.R.B. LEXIS 355, at *2 (June 30, 2004); Gen. Foods Corp., 231 N.L.R.B. 1232, 1235 (1977).

146. *Crown Cork*, 334 N.L.R.B. at 699–700. The employees were not represented by a union and there was no evidence of union organizing activity. *Id*. The structure created by the employer was guided by the "Socio-Tech System." *Id*. The essence of the "Socio-Tech System" was the delegation of managerial authority to "descending levels of committees which make decisions by consensus." *Id*. at 701.

147. *Id*. at 699.

148. *Id*. at 704.

and administered the plant's absentee program. In addition, the teams could implement a progressive discipline plan, including a "social contract" for any team member whose performance or behavior was at issue.[149] A breach of the "social contract" could result in the team recommending the member's suspension or discharge.[150]

At the next administrative level were an Organizational Review Board (ORB), an Advancement Certification Board (ACB) and a Safety Committee.[151] These committees were composed of two members from each of the four production teams and members of management.[152] These three committees reported to a fifteen-member Management Team, which was in turn accountable solely to the plant manager.[153] The ORB ensured consistent administration of plant policies by the four teams, recommended modifications to terms and conditions of employment, and reviewed team recommendations of disciplinary action against team members.[154] The ACB administered a program that rewarded employees with higher salaries for increased skill levels.[155] The Safety Committee reviewed accident reports and recommended changes to improve workplace safety.[156] Although the committees were required to operate within the parameters established by the Management Team and the plant manager, review of committee recommendations was extremely deferential. In fact, the plant manager testified that he could not recall overruling any of the committees' recommendations.[157]

The NLRB adopted the ALJ's recommendation and dismissed the complaint that the *Crown Cork* committees violated section 8(a)(2), holding that the committees did not exist to "deal with" management, but rather were created by management for the express purpose of delegating managerial functions to employees.[158] The fact that none

149. *Id.* at 699.
150. *Id*.
151. *Id*. at 699–700.
152. *Id*. at 699. The committees had about a dozen members each. *Id*.
153. *Id*.
154. *Id*. at 700.
155. *Id.*
156. *Id.*
157. *Id.* In many instances, decisions of the ORB were implemented even before they reached the plant manager for consideration. *Id*.
158. *Id*. at 701–02. The NLRB cited *General Foods Corp.*, 231 N.L.R.B. 1232 (1977), as

of the committees had "final and absolute" authority did not negate this conclusion.[159] The committees were analogous to the various levels of management that comprise a company's traditional "chain of command," in which most supervisors do not have final decision-making authority either.[160] Similarly, the *Crown Cork* committees, although they only acted within certain "delegated spheres of authority," *were* management within those spheres.[161]

IV. ANALYSIS

When orchestras consider expanding their musicians' traditional roles to include a greater responsibility for institutional governance, they must first ask whether the model under consideration jeopardizes their status as employees under the NLRA. In the case of the SPCO CBA, the answer to that question is likely that it does.

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an example of where "'managerial functions [were] flatly delegated to employees and [did] not involve any dealing with the employer on a group basis within the meaning of Section 2(5).'" *Crown Cork*, 334 N.L.R.B. at 701 (quoting *General Foods*, 231 N.L.R.B. at 1232–33). The *General Foods* employees, divided into four teams, made decisions by consensus and exercised control over, *inter alia*, job assignments and rotations, interviews of job applicants and safety inspections. *General Foods*, 231 N.L.R.B. at 1233. The NLRB determined that both the delegation of this power to the employees and any potential withdrawal of power would be "wholly unilateral" on the part of the employer. *Id.* at 1235. The tasks assigned to the committees "were just other assignments of job duties . . . not normally granted to rank-and-file personnel." *Id.*

In *Crown Cork*, the NLRB distinguished the *General Foods* and *Crown Cork* committees from those in *Keeler Brass Co.*, 317 N.L.R.B. 1110 (1995), in which an employee grievance committee engaged in "dealing with" the company when "the committee and the company 'went back and forth explaining themselves until an acceptable result was achieved'" with regard to an employee's discharge. *Crown Cork*, 334 N.L.R.B. at 700 (quoting *Keeler Brass*, 317 N.L.R.B. at 1114). The NLRB also noted that *General Foods* had been cited in *Electromation* for the proposition that "there is no 'dealing' if the organization's 'purpose is limited to performing essentially a managerial' function." *Crown Cork*, 334 N.L.R.B. at 701 (quoting Electromation, Inc., 309 N.L.R.B. 990, 995 (1992)).

159. *Crown Cork*, 334 N.L.R.B. at 701.

160. *Id.* The Board rejected the contention that "dealing" was present when a committee passed its recommendation on to a higher level of management. *Id.* "Rather, what is occurring in the Respondent's facility is the familiar process of a managerial recommendation making its way up the chain of command." *Id.*

161. *Id.*

A. Supervisory and Managerial Functions

There is little doubt that the duties performed by the SPCO's APC include some of the NLRA's twelve enumerated supervisory functions.[162] Most obviously, the APC's responsibility for hiring, discharging, and disciplining musicians aligns squarely with the types of activities expressly defined by the statute as supervisory activities.[163] In addition, the SPCO's audition and tenure committees, with the complete autonomy bestowed upon them by the CBA, behave in a supervisory capacity when they select a new member or award tenure to a probationary musician.[164]

The activities of the AVC, on the other hand, fall within the realm of managerial decision-making. As the team responsible for setting the "overall artistic direction and strategies of the organization," the AVC clearly formulates and executes the policies of management.[165] The AVC is explicitly vested with ultimate responsibility and accountability for "artistic policy decisions."[166] Season programming and the selection of conductors and guest artists are, in a traditional orchestra governance structure, among the signature tasks of a music director. Decisions about season structure, scheduling and performance venues are all traditionally within the province of an orchestra's artistic administration.[167] The SPCO CBA takes these tasks out of the hands of management and places them into the hands of the AVC, a committee whose membership is largely composed of bargaining unit musicians.[168]

1. In the Interest of the Employer

The SPCO musicians have asserted that they serve on the joint committees in a representative capacity, and not in the interests of the

162. *See* 29 U.S.C. § 152(11) (2005); *see also supra* note 88 and accompanying text.
163. 29 U.S.C. § 152(11) (2005).
164. *Id*.; *see also* SPCO Agreement, *supra* note 1, at 11–13.
165. SPCO Agreement, *supra* note 1, at 4.
166. *Id*.
167. *See supra* notes 14 and 42 and accompanying text.
168. SPCO Agreement, *supra* note 1, at 4–5.

employer.[169] However, the NLRB and courts are likely to find, as the Supreme Court did in *Yeshiva*, that, in reality, the interests of the musician employees cannot be meaningfully distinguished from the interests of the organization as a whole.[170] In *Yeshiva*, the Court noted that "[t]he 'business' of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions."[171] Similarly, the "business" of the SPCO is the creation of a quality symphonic "product." In fact, the SPCO CBA explicitly states that the assignment of leadership functions to the musicians bears a "direct and important relationship to the artistic quality of the SPCO."[172] Moreover, a successful concert-going experience for

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169. SPCO PLAYERS' ASS'N, SPCO PLAYERS' ASSOCIATION BYLAWS art. I, § 6 (on file with the author). This bylaw provides:

> Musicians who serve as representatives of their colleagues on cooperative committees with management shall regularly communicate with their fellow musicians to represent the musicians' views responsibly and vigorously, and shall confer with the body of musicians in scheduled meetings with meaningful dialogue on policy issues and issues having a substantial impact on individual musicians or the group. It is understood that these musician representatives are not employers or supervisors and are indemnified by management (in the collective bargaining agreement) for their role and positions in cooperative committees with management.

Id.

170. The musicians who serve on the APC and AVC committees surely see themselves as employees. They may view their service on these committees as either an exercise of independent professional judgment or service to their colleagues in a representative capacity, and may not see their interests as aligned with those of the management. However, it seems unlikely that a court or the NLRB, applying the managerial exclusion articulated in *Bell Aerospace* and developed in *Yeshiva University*, would view their activities the same way. The *Yeshiva* court made it clear that employees who formulated and effectuated management policies could exercise professional expertise and still be sufficiently aligned with management to qualify as managers. 444 U.S. 672, 686–88 (1980).

In the same way that the *Yeshiva* faculty controlled the university's management policies by setting curriculum, matriculation and grading standards and by determining scheduling, the SPCO's musicians are involved in controlling the SPCO's management policies by setting programming, artistic standards, and scheduling. *Id*. at 676. In addition, the Yeshiva faculty was involved in "every case of faculty hiring, tenure, sabbaticals, termination and promotion." *Id*. at 677. Similarly, the musicians on the APC are involved in every aspect of orchestra personnel decision-making.

171. *Id.* at 688.

172. SPCO Agreement, *supra* note 1, at 65. *But see* Molly Eastman, Note, *Orchestrating an Exclusion of Professional Workers from the NLRA: Has the Supreme Court Endangered Symphony Orchestra Musicians' Collective Bargaining Rights?*, 15 WASH. U. J.L. & POL'Y 313, 335 n.146 (2004) (asserting that orchestra musicians' commitment to artistic quality is not

SPCO patrons is of paramount concern to both SPCO management and its musicians. The same was true in *Health Care*, in which the primary concern of both the employer and the employee nurses was quality patient care. However, the Court determined that the nurses exercised supervisory authority in support of that concern.[173] In the university, health care, and symphony orchestra contexts, the interests of employers and employees are clearly aligned insofar as they aim to offer quality education, adequate medical care, or a thrilling concert-going experience. When an employee exercises supervisory authority in support of these shared goals, he or she does so "in the interest of the employer," and is therefore excluded from the Act's coverage.[174]

2. Independent Professional Judgment

The musician members of the SPCO governance committees unquestionably exercise independent professional judgment in the discharge of their committee responsibilities. The all-musician audition and tenure committees form the front line of artistic judgment. Members of these committees must engage specialized critical faculties, honed from years of training and experience, and bring them to bear on decisions as to whether a candidate is worthy of membership in the ensemble.[175] The musicians' decisions in these matters are final and are not subject to review by the SPCO management.[176] Likewise, the musicians who sit on the APC must base their decisions, particularly with regard to the recommendation of dismissals, on a similar store of professional expertise. In addition, the members of the AVC, though constrained by the financial

shared by orchestra boards and managements, who are primarily interested in the orchestra's role as a community service). This distinction is questionable, however, because it assumes that the symphonic product of an orchestra is not directly related either to the quality of the community service it provides or to its ability to attract funding.

173. NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 577 (1994).

174. *See supra* notes 86, 101.

175. *See* ICSOM, Facts About Orchestra Salaries—Context, http://orchestrafacts.org/context.htm (last visited Mar. 28, 2006) ("All orchestral musicians have years of intense, competitive training. Nearly all have undergraduate degrees; most have graduate studies.").

176. SPCO Agreement, *supra* note 1, at 11–14. *But see supra* note 43 (asserting that the management retains veto power over all committee decisions).

parameters set by the SPCO Executive Committee, must utilize substantial professional expertise with regard to the selection of repertoire, conductors, and guest artists.[177]

Far from being "ordinary professional or technical judgment" exercised in accordance with employer standards, which the NLRB argued should not qualify for the supervisory exclusion in *Kentucky River*,[178] the judgment that the SPCO committees exercise is more akin to that exercised by the *Yeshiva* faculty: highly independent judgment that presents a real danger of divided loyalty.[179] Even a consideration of the degree of the SPCO musicians' discretion, a test approved by the *Kentucky River* court,[180] reveals that the members' discretion is not narrowly circumscribed by their employer.

B. Employer-Dominated Labor Organization

The SPCO governance committees clearly satisfy two of the three requirements of a labor organization. First, employees participate. Second, the subject matter the committees address includes, at a minimum, working conditions. The remaining question in a section 8(a)(2) determination is whether the committees exist for the purpose, at least in part, of dealing with the employer.[181]

1. Dealing with the Employer

The SPCO musicians' activities on the APC and AVC satisfy the *Cabot Carbon* standard for "dealing with" the employer, which embraces a broader range of activities than simply collective bargaining.[182] The discussions that take place between the musician and management members, while not collective bargaining *per se*, satisfy the NLRB's less stringent requirement of a bilateral

177. SPCO Agreement, *supra* note 1, at 4.

178. NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 714 (2001) (internal quotation marks omitted).

179. NLRB v. Yeshiva Univ., 444 U.S. 672, 689 (1980) (noting the problem of divided loyalty as "particularly acute").

180. *Ky. River*, 532 U.S. at 713.

181. *See supra* note 117 and accompanying text.

182. NLRB v. Cabot Carbon Co., 360 U.S. 203, 211 (1959).

mechanism, outlined by the Seventh Circuit in *Electromation*.[183] Simply because each committee acts only on decisions made by consensus or by a supermajority of four members, every action proposed by the musician members must receive "real or apparent consideration" by management.[184] Further, the consensus or supermajority requirement means that any action taken by the committee must necessarily receive the approval of at least one of the management members.[185] This presents the same situation that was at issue in *du Pont*, in which the managers' capacity to reject employee proposals from within the committees was declared "only a difference of form" from dealing that may have taken place between employees and management outside the committees.[186]

2. Employer Domination

Although the employer did not dominate the formation of the SPCO joint committees, as the structure was bargained for and agreed upon during collective bargaining negotiations,[187] there are serious questions about whether the employer dominates the committees' administration. Most obviously, musician members are effectively compensated for their service on the committees.[188] Financial and logistical support for committee meetings were among the factors the NLRB took into account in finding a section 8(a)(2) violation in *Electromation*.[189]

The employer dominates the activities of the SPCO committees in two other ways as well. First, as discussed above, the consensus or supermajority decision-making requirement means that no proposal from the musicians will get beyond the committee without the

183. Electromation, Inc. v. NLRB, 35 F.3d 1148, 1161 (7th Cir. 1994).

184. *Id.*

185. SPCO Agreement, *supra* note 1, at 4–5.

186. E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 895 (1993).

187. Since the negotiations were conducted utilizing the same kind of consensus-based decision-making used by the committees, questions remain as to whether management did, in fact, impermissibly dominate the formation of the committees. This issue is beyond the scope of this Note.

188. SPCO Agreement, *supra* note 1, at 5–6.

189. *Electromation*, 35 F.3d at 1170 (noting that while employer support alone was not an unfair labor practice, "in the totality of the circumstances in this case such support may reasonably be characterized to be in furtherance of the company's domination").

agreement of at least one management member.[190] In *Electromation* and *du Pont*, the Seventh Circuit and the NLRB found this kind of management veto power indicative of improper domination.[191] While this requirement could result in decision-making gridlock, the more likely outcome is that the musicians will temper their proposals—in effect self-censoring their views—to present proposals most likely to pass the scrutiny of the management members.

Management also dominates the SPCO committees in the method by which musician members of the committee are selected. Only one musician on each committee, having been elected by his or her colleagues, can claim to act in a truly representative capacity.[192] Another musician on each committee serves merely because he or she volunteered for service; this member may not be the person their colleagues would have chosen had they voted.[193] The third musician's position on each committee is the most suspect. Neither elected by peers nor volunteering, this musician is hand-selected by the existing members of the committee, including the two management members; his or her appointment is subject to the same consensus or supermajority decision-making requirement as all other committee decisions.[194] Management control over the selection of committee members was an important factor in finding a section 8(a)(2) violation in both the *Electromation* and *du Pont* cases.[195] In this situation, musician proposals may be tempered to win the approval of management committee members. Moreover, suggestions for future committee members are highly unlikely to include those musicians whose views are openly contrary to those views of management, no

190. *See supra* note 184 and accompanying text.

191. *Electromation*, 35 F.3d at 1163 (noting that management committee members were permitted to "review and reject committee proposals before they could be presented to upper level management"); *E.I. du Pont*, 311 N.L.R.B. at 896 (noting that employer veto power "exists by virtue of the management members' participation in consensus decision-making").

192. SPCO Agreement, *supra* note 1, at 4, 6.

193. *Id*.

194. *Id*.

195. *Electromation*, 35 F.3d at 1170 (finding that employer exercised "significant control over the employees' participation and voice at the committee meetings"); *E.I. du Pont*, 311 N.L.R.B. at 896 (finding that employer determined how many employees served and decided between volunteers where their number exceeded the available positions).

matter how representative they may be of the majority of orchestra members.[196]

C. Committee Performance of Managerial or Supervisory Functions

As the above analysis indicates, the SPCO committees potentially violate section 8(a)(2), and should, therefore, be subject to disestablishment. However, the NLRB can make an exception for committees whose duties are actually managerial and supervisory. As in *Crown Cork*, the SPCO scheme effectively delegates functions traditionally carried out by management personnel to joint employer-employee committees.[197] Similar to the hierarchical structure implemented in *Crown Cork*, the SPCO committees operate within specific levels, or spheres, of authority.[198] For example, the audition and tenure committees serve with a degree of autonomy in specialized roles that are overseen by the APC. Above these committees sits the management. All committee decisions are, according to SPCO manager, Bruce Coppock, subject to veto by management.[199] In addition, the SPCO's Board of Directors retains ultimate fiscal responsibility.[200] Although each level is answerable to the one above, each committees is, at its respective level, empowered to "decide and do" with regard to a range of issues comparable to those controlled by the *Crown Cork* committees.[201] Management's power to veto decisions and the Board of Directors' ultimate control over the institution do not constitute "dealing with" the musicians; rather, as in *Crown Cork*, these employer controls are consistent with the ordinary managerial structure of any company.[202]

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196. Management's selection of its own representatives is in no way constrained, and in practice, the SPCO management has placed two of its most powerful managers, the CEO and the General Manager, on both committees. E-mail from Herb Winslow, Orchestra Committee Chair, SPCO, to Rochelle Gnagey Skolnick (Oct. 31, 2004) (on file with author).

197. Crown Cork & Seal Co., 334 N.L.R.B. 699, 699 (2001).

198. *Id*. at 701 ("[W]ithin their delegated spheres of authority, the seven committees *are* management.").

199. E-mail from Herb Winslow, *supra* note 196.

200. *See supra* notes 14 and 42 and accompanying text.

201. *Crown Cork*, 334 N.L.R.B. at 704.

202. *Id*. at 701.

CONCLUSION

Orchestra musicians are clearly faced with a conundrum. The American market for live classical music presents numerous hurdles to institutional success. Orchestras, including the SPCO, have responded by trying to reinvent themselves, both in terms of their public appeal and their institutional structures.[203] The waning presence of music directors has left gaps in organizations whose CBAs assume the presence of a dominating artistic guide to carry out certain essential leadership functions. Musicians, drawn in by the leadership vacuum and eager to make the best possible use of their talents and skills, have begun to expand their traditional roles.

Unfortunately, American labor law has not kept pace with changes in the American workplace. Explorations in collaborative governance are not new to American industry, but the law does not provide for such models. As a result, these ventures present the danger to employers that the joint committees may violate section 8(a)(2), and the danger to employees that their service on these committees may confer on them supervisory or managerial status, placing them outside the coverage of the NLRA.

Musicians have long been cognizant of risks to their employee status because of their roles as principal players or their service on audition committees.[204] The industry's new move toward shared governance jeopardizes that status via an alternate route. Scholars are sanguine about negotiating CBAs that leave workers exposed to the danger of being cast outside the coverage of the Act.[205] Musicians should be cognizant of these dangers and refuse to accept agreements that threaten their covered employee status. While the level of trust

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203. *See, e.g.*, Daniel J. Wakin, *New Overtures at the Symphony*, N.Y. TIMES, Aug. 21, 2005, at Arts and Leisure 1. Wakin describes the "wide array of methods" American orchestras currently employ to build and diversify their audiences. *Id.*

204. *See, e.g.*, Eastman, *supra* note 172; Leonard Leibowitz, *Yeshiva Revisited*, SENZA SORDINO, Dec. 2002, at 11, *available at* http://www.icsom.org/pdf/senza405.pdf.

205. Interview with Thomas Kochan, Co-Director, Inst. for Work and Employment Research, Mass. Inst. of Tech., Sloan School of Mgmt., and Professor of Mgmt. and Eng'g Sys. (Nov. 18, 2004). Kochan acknowledged this danger, particularly if an employer, who adopted such a shared governance structure, chose to refuse to bargain with its employees in the future. *Id.* However, he asserted that if there was a high level of trust between the parties, they should not be afraid to "get out in front of the law." *Id.*

between musicians and management of a given institution may today be high, given the historically rapid turnover rate of managements and boards, there is no guarantee for musicians that tomorrow's leadership will be similarly benign. If a future SPCO management refuses to bargain with the musicians, claiming it has no duty to do so because the musicians are not statutorily covered employees, the musicians would be unlikely to convince the NLRB otherwise.

Musicians should not and need not, however, entirely remove themselves from the governance of their institutions. As the resident body of experts on the artistic product of the symphony orchestra, musicians represent a vast resource for orchestra CEOs and boards of directors. Service on traditional audition committees and artistic advisory committees, as long as it is undertaken in a purely advisory capacity, should present no substantial dangers to the status of musicians under the NLRA. Cooperative committees, for which the parties bargain, that do not vest the musicians with supervisory or managerial tasks or impinge on the union's role as the exclusive bargaining representative can discuss topics of mutual concern to management and musicians.[206] Certainly, management should cultivate concerted efforts by musicians to educate board members on certain issues. These activities can all be undertaken with minimal risk to either side, and have the potential to pay great dividends in terms of the symphony orchestra's continued vitality.

Unless and until Congress enacts substantial labor reforms, musicians and managements must tread carefully to remain on the correct side of the NLRA. Gains secured for orchestra musicians through collective bargaining must be safeguarded and cultivated watchfully to ensure the vibrant future of American orchestral music.

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206. *See* Moberly, *supra* note 116, at 359 (concluding that section 8(a)(2) does not preclude the development of cooperative programs so long as they do not involve employers dealing with employees on conditions of employment).