

# NOTE

## WAVE YOUR LITTLE HAND AND WHISPER SO LONG DEARIE: PROFFERING AN OVERDUE GOODBYE TO MICROUNITS IN THE PERFORMING ARTS

AMANDA JOOS\*

### I

#### INTRODUCTION

On November 12, 2016, Supreme Court Justice Ruth Bader Ginsburg<sup>1</sup> made her highly anticipated operatic debut.<sup>2</sup> The Justice starred as the Duchess of Krakenthorp in *La Fille du Régiment* at Washington National Opera at the John F. Kennedy Center for the Performing Arts in Washington, DC.<sup>3</sup> While the public eagerly anticipated the Justice's appearance on the stage, the Justice interacted with a diverse cast of characters backstage. Most of the people the Justice encountered on her debut evening were members of various unions within the performing arts.<sup>4</sup>

---

Copyright © 2022 by Amanda Joos.

This Article is also available online at <http://lcp.law.duke.edu/>.

\* I thank Joseph Blocher, Sydney Engle, Chelsea Garber, Hope Sarah Goldstein, and David Schwartz for extensive comments and support. A special thank you to Hope Goldstein for sharing her love of collective bargaining with me and inspiring me to go to law school.

1. Justice Ginsburg, an opera fan, regularly attended rehearsals and operatic performances, and the opera *Ginsburg/Scalia* featured her friendship with Justice Scalia. See generally Francesca Zambello, *Ruth Bader Ginsburg Loved Opera, and Opera Loved Her Back*, N.Y. TIMES (Sept. 19, 2020), <https://www.nytimes.com/2020/09/19/arts/music/ruth-bader-ginsburg-opera.html> [<https://perma.cc/R6V8-3P32>] (discussing Ruth Bader Ginsburg's love of opera).

2. Justice Ginsburg previously appeared in silent roles in three operas, but this was her first speaking role. She even assisted in writing her own politically charged lines. *Justice Ruth Bader Ginsburg Trades Her Robes for an Opera Costume*, ASSOCIATED PRESS (Nov. 13, 2016), <https://www.latimes.com/entertainment/arts/la-et-rbg-play-20161113-story.html> [<https://perma.cc/3EBT-2E5X>].

3. Most performing arts centers and classical performing arts organizations are non-profits. KRISTIN THOMSON, KRISTEN PURCELL & LEE RAINE, PEW RSCH. CTR., ARTS ORGANIZATIONS & DIGITAL TECHNOLOGIES 7 (2013), <https://www.pewresearch.org/internet/2013/01/04/arts-organizations-and-digital-technologies/> [<https://perma.cc/3RDX-7NQ7>]. However, large performing arts centers, like the Kennedy Center, book touring shows and concerts, like Broadway musicals or pop concerts, that are commercial ventures. This can result in some differing approaches to negotiating with unions.

4. See Alan S. Jaffe, *Performing Institutions and the Labor Unions*, 5 ART & L. 36, 37 (1980) (describing the various unions in the non-profit and for-profit arts and culture sector).

Due to the Justice's status as a celebrity, her driver likely pulled into a loading dock and dropped her off under the Opera House stage to walk to her dressing room. On her walk, she probably heard the pit orchestra musicians<sup>5</sup> warming up under the Opera House's stage. She might have heard the director<sup>6</sup> walking on stage making some final changes with the stagehands<sup>7</sup> or other members of the creative team.<sup>8</sup> As she walked towards her dressing room, the Young Artists<sup>9</sup> were likely wandering around the hallways taking selfies in their costumes, and the chorus members<sup>10</sup> were following the chorus master and staff pianist<sup>11</sup> to a rehearsal room for their warmup. When the Justice finally arrived in her dressing room, she probably found a copy of the score that the music librarian<sup>12</sup> left for reference. Through the wall of her dressing room, she might have heard the

---

5. Orchestra musicians, whether symphonic or pit orchestra musicians, are typically members of the American Federation of Musicians (AFM). *See generally* AFM, <https://www.afm.org> [<https://perma.cc/CU7G-LJNC>] (last visited Mar. 7, 2022). However, their work may be governed by multiple collective bargaining agreements (CBAs). For example, the musicians of the Washington National Opera Orchestra also make up the Kennedy Center Opera House Orchestra. When they perform in an opera, like *La fille du regiment*, they perform under a CBA with Washington National Opera. However, when they perform ballets, in exactly the same venue with exactly the same people, they perform under a CBA with the Kennedy Center. The rates of pay are different and some of the work rules are different. Additionally, the National Symphony Orchestra, which performs in the Concert Hall at the Kennedy Center, has its own CBA that governs a completely different group of musicians with a completely different set of work rules and pay scales. Furthermore, sometimes orchestras have playing personnel managers who are also responsible for payroll and enforcing work rules under the CBA but remain members of the AFM. Thus, even as members of the same union, the CBAs that govern musicians' work can vary widely.

6. Directors and assistant directors of operas and ballets are members of the American Guild of Musical Artists (AGMA). *See generally* AGMA, <https://www.musicalartists.org> [<https://perma.cc/Q2DG-YZDW>] (last visited Mar. 7, 2022). Alternatively, Broadway directors and assistant directors are members of Actors' Equity. *See generally* ACTORS' EQUITY, <https://www.actorsequity.org> [<https://perma.cc/9ZU5-NABU>] (last visited Mar. 7, 2022). While directors are members of a union, their rates are typically individually negotiated.

7. Stagehands are members of the International Alliance of Theatrical Stage Employees (IATSE). Stagehands include riggers, sound technicians, electricians, carpenters, property masters, and audio technicians. *See generally* IATSE, <https://iatse.net> [<https://perma.cc/W28M-LS5B>] (last visited Mar. 20, 2022).

8. Some members of the creative team, like a set designer, sound designer, or lighting designer are union members. For example, set designers are typically members of the United Scenic Artists (USA). *See generally* USA, <https://www.usa829.org> [<https://perma.cc/4V8T-DDYP>] (last visited Mar. 20, 2022).

9. Young Artists, who have typically completed an advanced degree in vocal performance and are under thirty years old, are members of AGMA. They are selected by companies to remain in residence for one to three years. They typically receive performance fees regulated by the local CBA and a separate non-union living stipend. AGMA, *supra* note 6; *see also*, Laura Brooks Rice, *Defining Your Career Level and Choosing a YAP*, OPERA AM. (June 1, 2017), <https://www.operaamerica.org/media/ulphpu0w/choosingyap.pdf> [<https://perma.cc/3PY9-XZJR>].

10. Chorus members are members of AGMA. They are paid under the locally negotiated CBA. *Id.*

11. Staff pianists and chorus masters are sometimes members of the AFM, but their work is typically regulated by a different CBA than the pit musicians. However, when staff pianists play in the orchestra pit, they are paid under the pit musicians' CBA, not their music staff CBA. AFM, *supra* note 5.

12. Music librarians are sometimes members of the AFM. Because their work is different than that of the musicians, their pay rates and work rules are often included as an appendix to the orchestra's CBA. *Id.*

tenor,<sup>13</sup> Larry Brownlee, warming up his high C's for the famous aria “Ah! Mes amis, quel jour de fête!”<sup>14</sup> In her dressing room, the Justice was likely greeted by a hairdresser and make-up artist,<sup>15</sup> and an assistant stage manager<sup>16</sup> probably stopped by to check in.

Justice Ginsburg's experience—interacting with numerous members of various unions—was not unique. Before attending a glamorous performance, opera patrons engage in various pre-performance behaviors. Some patrons pull into the parking garage seeking the assistance of a parking attendant.<sup>17</sup> Others may pick up their tickets at the box office.<sup>18</sup> Prior to entering the theater, patrons will give their tickets to the usher.<sup>19</sup> If there is a problem with the ticket, the house manager<sup>20</sup> stands nearby to assist. Meanwhile, a group of tourists hoping for a star sighting might enjoy dinner at the public café.<sup>21</sup> Overall, a night at the opera, or even a stop at the Opera House, inevitably involves a plethora of union interactions.

This raises an important question: how do the performing arts become more adaptable when unions can be obstacles to major reforms?<sup>22</sup> Singers, musicians,

13. Soloist singers are members of AGMA. AGMA, at a national level, distinguishes each role as either a leading, featured, supporting, solo bit, chorus bit, or mute bit role for every opera and publishes the Schedule C on its website. Then, the minimum rate for the role classification is bargained for in the local CBA. Any company that wants to combine roles or produce a new opera must individually negotiate with AGMA for a waiver or change. *Schedule C*, AGMA, <https://www.musicalartists.org/contracts-and-agreements/schedule-c> [<https://perma.cc/M23V-HGDW>] (last visited Mar. 20, 2022).

14. This aria is notoriously challenging for tenors due to the required eight high C's. Lyric Opera of Chicago, “Ah, mes amis” with Lawrence Brownlee (*Excerpt*), YOUTUBE (Nov. 30, 2020), <https://www.youtube.com/watch?v=8Lm06UuiGXA> [<https://perma.cc/B3EJ-MHA4>].

15. Makeup, wig specialists, and costume assistants are members of IATSE. They often have a separate CBA from the stagehands. IATSE, *supra* note 7.

16. Stage managers and assistant stage managers for opera and ballet are members of AGMA. AGMA, *supra* note 6. Alternatively, stage managers for Broadway shows are typically covered by Equity contracts. ACTORS' EQUITY, *supra* note 6. Stage managers are often also responsible for enforcing break rules for singers and chorus members and tracking chorus members' hours for management.

17. Parking assistants are members of UNITE HERE! See generally UNITE HERE!, <https://unitehere.org/> [<https://perma.cc/9N87-GV7M>] (last visited Apr. 21, 2022).

18. Box office staff, who are members of IATSE, include both in-person ticket sellers and treasurers who manage the monetary and contractual aspects of ticket selling. Instant-Charge staff, who handle telephone operations for box office sales, have a separate CBA but are also represented by IATSE. IATSE, *supra* note 7.

19. Ushers, who welcome patrons into the house, are often union members represented by IATSE, though they are non-union at the Kennedy Center. *Id.* They can also be represented by the Service Employees International Union (SEIU). See generally SEIU, <https://www.seiu.org/> [<https://perma.cc/C7HB-CFKW>] (last visited May 6, 2022).

20. House managers, who are responsible for front of house operations and liaising with company managers, are members of the Association of Theatrical Press Agents and Managers (ATPAM). Company managers, who typically manage touring groups, are also members of ATPAM. See generally ATPAM, <https://www.atpam.com> [<https://perma.cc/Z7WB-WD66>] (last visited Mar. 7, 2022). These positions are often responsible for tracking payroll for stagehands and ushers.

21. Cooks and cashiers belong to UNITE HERE! In a large performing arts organization, these employees likely support a public café or restaurant and a backstage canteen. UNITE HERE!, *supra* note 17.

22. See Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 797

dancers, stagehands, ushers, and food-service workers create one fully integrated experience. Yet, these professionals are segmented into separate unions and collective bargaining agreements. To illustrate how fully integrated performing arts workers are, consider two seemingly innocent scenarios: a concertmaster bowing prior to the conductor's cue and a traffic jam in a theater parking lot.

What happens if the concertmaster bows before the conductor cues him or her at the beginning of an act? First, the orchestra begins to play, but the conductor has not made a cue. Thus, the stage manager has a delayed cue to the crew to raise the curtain, and the assistant stage manager is also delayed in cueing the singers, dancers, and actors. While professionals resolve a crisis like this in moments, an early bowing impacts hundreds of people due to the inherent precision required in a theatrical performance. Alternatively, consider what happens if a traffic jam occurs outside of the parking garage just before curtain. A parking attendant must notify the house manager, who notifies the ushers and stage manager, and then the stage manager ultimately delays the performance. Under many collective bargaining agreements (CBAs), a performance starts at the posted curtain time so the musicians, actors, and stagehands could run into overtime and earn unexpected payments. In both scenarios, a small derivation from performance expectations leads to disruptions for hundreds of employees.

Therefore, in response to the completely integrated working environment of the performing arts, lawyers, union organizers, members of management, and employees at arts organizations should pursue an integrated approach to union organization by focusing on the formation of wall-to-wall units, rather than microunits, during unionization. Wall-to-wall units share work rules and bargained-for policies across all organized employees, rather than different rules for each different CBA.

The time for this change is now. Many arts organizations have long histories of collective bargaining,<sup>23</sup> making major changes to CBAs difficult.<sup>24</sup> Given the strong presence of unions, the expiration of a CBA, without a successful successor negotiation, can easily shut down an arts organization, harming both the business and mission-driven activities.<sup>25</sup> Furthermore, because labor disputes in the performing arts impact the general public more than some private sector businesses, the eruption of a labor dispute leads to significant press coverage.<sup>26</sup> For example, the COVID-19 pandemic led to a high amount of high-publicity

---

(2017) (discussing that police unions are “obstacles to reforms that would make policing more transparent, accountable, and legitimate to the citizenry”).

23. Many arts organizations have existed for over twenty years. Jaffe, *supra* note 4, at 36.

24. See Daniel J. Julius & Nicholas DiGiovanni Jr., *What Factors Affect the Time It Takes To Negotiate Faculty CBAs?*, 8 J. COLLECTIVE BARGAINING ACAD., Dec. 2016, at 1, 3 (explaining how the NLRB brought most non-profit performing arts organizations under its jurisdiction in 1973).

25. See STRUCTURE OF COLLECTIVE BARGAINING: PROBLEMS AND PERSPECTIVES 349 (Arnold R. Weber ed., 1961) (discussing that eighteen different bargaining units with possibly eighteen different expiration dates would harass the public and lead to a possible shutdown of a business).

26. Jaffe, *supra* note 4, at 36.

labor strife.<sup>27</sup> While arts organizations often shut down due to fiscal irresponsibility in recessions,<sup>28</sup> the COVID-19 pandemic shut down revenue-generating performances for many months, unlike any previous recession.<sup>29</sup> Thus, the closure of some organizations and a new generation of replacement arts organizations is probable,<sup>30</sup> allowing for a new approach to union organizing drives.

As the performing arts attempted to restart their paused industry, the National Labor Relations Board (NLRB or the Board) granted review to two cases regarding unit determination, *American Steel Construction, Inc.*, evaluating the requirements to form a microunit,<sup>31</sup> and *Nissan North America, Inc.*, evaluating the requirements to form a craft unit.<sup>32</sup> Experts anticipated that the Board would make it easier for microunits and craft units to form,<sup>33</sup> and on December 14, 2022, the Board reverted to the prior *Specialty Healthcare* standard, which allows for easier creation of microunits.<sup>34</sup> This decision will harm industries with inherent integration, such as the performing arts.

To make the argument for wall-to-wall units in the performing arts, Part II outlines how unions work within the performing arts, along with the reasons why management and the union may favor one type of unit over the other. Part III discusses the recent NLRB cases and reasons that the alteration of the *PCC Structurals/Boeing* standard is harmful for the performing arts. Finally, Part IV argues that wall-to-wall units serve both management and unions, even though implementation could be difficult. Thus, the performing arts should move forward with a new approach, regardless of the NLRB's upcoming and recently decided decisions.

---

27. Julia Jacobs, *Even When the Music Returns, Pandemic Pay Cuts Will Linger*, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/2020/12/17/arts/music/performing-arts-unions-pandemic.html> [<https://perma.cc/NY4D-C9QV>].

28. See generally Javier C. Hernández, *The Pandemic Struck Orchestras with Underlying Conditions Hard*, N.Y. TIMES (Dec. 21, 2021), <https://www.nytimes.com/2021/12/21/arts/music/orchestra-labor-coronavirus.html> [<https://perma.cc/F8NT-ZG3C>] (discussing the COVID-19 pandemic's impact on already struggling orchestras); William H. Honan, *Arts Groups, Too, Struggle with Recession*, N.Y. TIMES (Dec. 30, 1991), <https://www.nytimes.com/1991/12/30/arts/arts-groups-too-struggle-with-recession.html> [<https://perma.cc/ZVQ9-3DNN>] (discussing the impact of a recession on arts organizations).

29. DANIEL FONNER & ZANNIE VOSS, SMU DATAARTS, COVID-19 IMPACT ON NONPROFIT ARTS AND CULTURE IN NEW YORK CITY 6 (2020); Jason Fargo, *The Arts Are in Crisis. Here's How Biden Can Help.*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/arts/design/arts-stimulus-biden.html> [<https://perma.cc/BBC7-W5YP>].

30. See *infra* note 186.

31. Am. Steel Constr., Inc., 371 N.L.R.B. No. 41, slip op. at 2 (Dec. 7, 2021).

32. Nissan N. Am., Inc., 371 N.L.R.B. No. 43, slip op. at 1 (Dec. 21, 2021).

33. Joshua Fox, Mark Theodore & Timothy Kelly, *Here We Go Again: NLRB Foreshadows a Potential Return to Micro-Units*, PROSKAUER (Dec. 9, 2021), <https://www.laborrelationsupdate.com/uncategorized/here-we-go-again-nlr-foreshadows-a-potential-return-to-micro-units/> [<https://perma.cc/C7SN-WDJC>] (discussing the previous rule making it easier for unions to organize employees into microunits).

34. Am. Steel Constr., Inc., 372 N.L.R.B. No. 23, slip op. at 1 (Dec. 14, 2022).

## II

## UNDERSTANDING UNIONS IN THE PERFORMING ARTS AND CHANGING PRACTICES

Employers and union representatives are required to collectively bargain for terms and conditions of employment, though there is no requirement to come to an agreement or make any concessions.<sup>35</sup> Subjects of bargaining may be mandatory, permissive, or illegal.<sup>36</sup> Mandatory topics relate to wages, hours, or other conditions of employment that are “germane to the working environment”<sup>37</sup> but are not “managerial decisions, which lie at the core of entrepreneurial control.”<sup>38</sup> Other terms and conditions include policies like drug and alcohol testing, polygraph tests, video surveillance in the workplace, and physical examinations.<sup>39</sup> More simply, if an employee can be disciplined for violating a policy, the policy must be collectively bargained over. In the performing arts, issues involving the musicians’ health and well-being, work environment, and performance quality are all topics of bargaining.<sup>40</sup>

It is fundamental to understand the early steps of union organizing to understand the importance of unit selection.<sup>41</sup> First, a union representative contacts a group of employees or employees contact a union representative, and the union representative explains the benefits of joining the union.<sup>42</sup> Then, if the employees are interested, the union must submit a petition and authorization cards to the NLRB from 30% or more of the employees seeking representation in the proposed unit.<sup>43</sup> Because employers are currently legally allowed to give non-coercive “captive audience speeches,”<sup>44</sup> where an employer mandates that employees attend meetings explaining the benefits of not having a union,<sup>45</sup> unions often seek 50%–70% of authorization cards to protect themselves against a decrease in interest.<sup>46</sup> Next, the union files the petition and required proof of

---

35. National Labor Relations Act, 29 U.S.C. § 158(d).

36. SAMUEL ESTREICHER & MATTHEW T. BODIE, LABOR LAW 144–45 (Saul Levmore et al. eds., 2d ed. 2020). Permissive and illegal bargaining topics fall outside of the scope of this article.

37. Johnson-Bateman Co., 295 N.L.R.B. 180, 182 (1989).

38. Ford Motor Co. v. NLRB, 441 U.S. 488, 498 (1979) (quoting Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 222–23 (1964) (Stewart, J., concurring)).

39. Colgate-Palmolive Co., 323 N.L.R.B. 515, 519 (1997).

40. Everette J. Freeman, *Research Issues in Orchestra Labor Relations*, HARMONY, no. 2, Apr. 1996, at 27, 31. The welfare of a musician may include things like wages, benefits, work rotation schedules, break rules, temperature controls, and sexual harassment training.

41. For a deeper understanding of representation cases, see generally NLRB, CASEHANDLING MANUAL PART TWO REPRESENTATION PROCEEDINGS (2020).

42. ESTREICHER & BODIE, *supra* note 36, at 104.

43. *Id.*

44. Livingston Shirt Corp., 107 N.L.R.B. 400, 415 (1953). While captive audience meetings are currently permissible, the NLRB’s General Counsel seeks to eliminate them. Memorandum GC-22-04 from Jennifer A. Abruzzo, General Counsel, to All Regional Directors, Officers-in-Charge, and Resident Officers (Apr. 7, 2022), <https://apps.nlr.gov/link/document.aspx/09031d458372316b> [<https://perma.cc/CB8D-DN7X>].

45. Litton Sys., Inc., 173 N.L.R.B. 1024, 1030 (1968).

46. ESTREICHER & BODIE, *supra* note 36, at 104; *Defeating Micro-Units: Employer Strategies To*

authorization with the NLRB.<sup>47</sup> Then, the employer is given formal notice of the Union’s petition and the opportunity to assert challenges to the petition, like claiming that the petition fails to define an appropriate unit of employees.<sup>48</sup> After these steps, the NLRB schedules the secret ballot election, and if the union receives a majority of the votes at the election, the Board certifies the union as the exclusive bargaining representative of the petitioned-for employees.<sup>49</sup>

Before collecting authorization cards or a petition, the union must determine what positions are included within the unit.<sup>50</sup> Units can be an “employer unit, craft unit, plant unit, or subdivision thereof.”<sup>51</sup> Wall-to-wall units include all non-supervisory, non-management employees in the same union.<sup>52</sup> By contrast, microunits involve smaller units of specialized employees, often resulting in multiple unions and CBAs.<sup>53</sup> Craft units are another type of microunit for highly skilled workers.<sup>54</sup> For example, a union trying to organize eighty-seven Tool and Die Maintenance Technicians, but no other workers at a plant, would seek to form a craft unit.<sup>55</sup> Alternatively, that union could try to organize all 4,300 production and maintenance employees, forming a wall-to-wall unit.<sup>56</sup>

#### A. What is a Microunit?

Section 9(a) of the National Labor Relations Act (NLRA) requires the Board to determine whether the unit is “an appropriate unit.”<sup>57</sup> The Board need not consider if the selected unit is the only appropriate unit or even the most

---

*Challenge Smaller Bargaining Units*, EMPS.’ LAWS. (Oct. 28, 2014), <https://www.employerslawyersblog.com/2014/10/defeating-micro-units-employer-strategies-to-challenge-smaller-union-collective-bargaining-units-nlr.html> [<https://perma.cc/AS38-W6B8>]; see Annie Palmer, *How Amazon Fought the Union Drive in Alabama*, CNBC (Apr. 16, 2021), <https://www.cnbc.com/2021/04/16/how-amazon-fought-the-union-drive-in-alabama.html> (showing the effectiveness of captive audience speeches, despite the later committed unfair labor practices prior to the election).

47. ESTREICHER & BODIE, *supra* note 36, at 104.

48. *Id.* This could include inappropriately pursuing a microunit rather than a wall-to-wall unit.

49. *Id.*

50. *Id.* at 105.

51. National Labor Relations Act, 29 U.S.C. § 159(b). This article focuses on wall-to-wall units, microunits, and craft units. The terms “wall-to-wall unit” and “microunit” are viewed as management-side terms. However, no other neutral terminology has been universally adopted by labor organizers. Thus, the terms “wall-to-wall unit” and “microunit” are used throughout this article for clarity.

52. ESTREICHER & BODIE, *supra* note 36, at 35.

53. Amanda B. Stubblefield, *In Employment Law What Is a “Micro-Unit” – and Why Does It Matter?*, NAT’L L. REV. (Sept. 22, 2014), <https://www.natlawreview.com/article/employment-law-what-micro-unit-and-why-does-it-matter> [<https://perma.cc/2Z8M-2E7A>].

54. See ESTREICHER & BODIE, *supra* note 36, at 107 (discussing the history and difference between craft and wall-to-wall units).

55. See generally *Opposition to Request for Review of Decision and Direction of Election*, Nissan N. Am., Inc., 371 N.L.R.B. No. 43 (Dec. 21, 2021) (Case 10-RC-273024), <https://www.nlr.gov/case/10-RC-273024> [<https://perma.cc/R9NX-6GAF>] (discussing the organizing of tool and die workers).

56. *Id.* at 16.

57. *Wheeling Island Gaming*, 355 N.L.R.B. 637, 637 n.2 (2010) (citing *Overnite Transp. Co.*, 322 N.L.R.B. 723 (1996)).

appropriate unit.<sup>58</sup> Prior to *American Steel Construction, Inc.* changing the standard for microunit determination in December 2022,<sup>59</sup> the Board analyzed “whether employees in the proposed unit share[d] a community of interest sufficiently distinct from the interests of employees excluded from the unit to warrant a separate bargaining unit.”<sup>60</sup> Under the previous *PCC Structurals/Boeing* standard for microunits, the Regional Director examined whether the petitioned-for employees had interest sufficient to constitute an appropriate unit.<sup>61</sup> If so, the Board considered “whether employees in the proposed unit share[d] a community of interest sufficiently distinct from the interests of employees excluded from that unit to warrant a separate bargaining unit.”<sup>62</sup> In weighing the “shared *and* the distinct interests of petitioned-for and excluded employees[,]” the Board considered whether “excluded employees [had] meaningfully distinct interests in the context of collective bargaining that outweigh[ed] similarities with unit members.”<sup>63</sup> The Board relied on—and continues to rely on<sup>64</sup>—a community of interest analysis to make a microunit determination which examined:

[W]hether the employees [were] organized into a separate department; [had] distinct skills and training; [had] distinct job functions and perform[ed] distinct work, including an inquiry into the amount and type of job overlap between classifications; [were] functionally integrated with the Employer’s other employees, [had] frequent contact with other employees; interchange with other employees; [had] distinct terms and conditions of employment; and [were] separately supervised.<sup>65</sup>

Next, following the steps outlined by *Boeing*, the Board examined (1) whether the petitioned-for group of employees shared a community of interest, (2) whether the excluded employees had meaningfully distinct interests in the context of collective bargaining that outweighed similarities with unit members, and (3) whether the Board had previously made decisions on appropriate units in the particular industry involved.<sup>66</sup>

However, in *American Steel Construction, Inc.*, the Board decided to revert to the prior standard, set by *Specialty Healthcare*.<sup>67</sup> This framework considers:

whether the employees in the petitioned-for unit share a community of interest (i.e., whether the unit is “homogeneous”); whether the petitioned-for unit is “readily identifiable as a group” (i.e., “identifiable”) based on “job classifications, departments, functions, work locations, skills, or similar factors;” and whether the petitioned-for unit is “sufficiently distinct . . . when a party asserts that “the smallest appropriate unit

---

58. *Id.*

59. *Am. Steel Constr., Inc.*, 372 N.L.R.B. No. 23, slip op. at 1 (Dec. 14, 2022).

60. *PCC Structurals Inc.*, 365 N.L.R.B. No. 160, slip op. at 11 (Dec. 15, 2017).

61. *Id.*

62. *Id.*

63. *Id.* (quoting *Constellation Brands U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016)).

64. *Am. Steel Constr., Inc.*, 372 N.L.R.B. No. 23, slip op. at 1 (Dec. 14, 2022).

65. *PCC Structurals Inc.*, 365 N.L.R.B. No. 160, slip op. at 11 (Dec. 15, 2017) (citing *United Operations*, 338 N.L.R.B. 123, 123 (2002)).

66. *Boeing Co.*, 368 N.L.R.B. No. 67, slip op. at 3–4 (Sept. 9, 2019).

67. *Am. Steel Constr., Inc.*, 372 N.L.R.B. No. 23, slip op. at 1 (Dec. 14, 2022).



contains employees not in the petitioned-for unit” . . . the party contesting the petitioned-for unit bears the burden of proving that there is an “overwhelming community of interest” between the petitioned-for and excluded employees in order to add the excluded employees to the petitioned-for unit.<sup>68</sup>

In *Specialty Healthcare*, the Board specifically held that:

[W]hen employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an *overwhelming community of interest* with those in the petitioned-for unit.<sup>69</sup>

This Obama-era decision made it easier for a union to win an election because the union could focus on a subset of interested employees, rather than pursue a whole plant for unionization.<sup>70</sup> The threshold for this test is also far lower than the standard set out in the *PCC Structurals/Boeing* test.<sup>71</sup> *Specialty Healthcare* allows unions to target specific departments or subsets of an employer’s workforce that are identifiable as a group and share a community of interest.<sup>72</sup> This means that the Board can now declare a microunit an appropriate unit, even if a larger group might have been more appropriate.<sup>73</sup> In opposition, the *PCC Structurals/Boeing* test held that the petitioned-for unit must have a *sufficiently distinct community of interest* from other employees to be considered for a separate unit.<sup>74</sup> This places the burden on the union not only to show that there is a distinct community of interest but also that *excluded employees would not appropriately fit into the unit*.<sup>75</sup> Because it is easier to organize into smaller microunits, the *Specialty Healthcare* test lessens the likelihood that unions will seek wall-to-wall units.

In the performing arts, recent industry shifts have created a fully integrated workforce.<sup>76</sup> While a carpenter and an opera singer possess different training, and would likely never interchange their job responsibilities, neither has a job without

---

68. *Id.* at 4; *see also* *United Operations*, 338 N.L.R.B. 123, 123 (2002) (outlining the community of interest standard).

69. *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 N.L.R.B. 934, 945–46 (2011) (emphasis added).

70. *See* Fox, Theodore & Kelly, *supra* note 33 (discussing why it is easier to organize fewer employees).

71. *Compare Specialty Healthcare*, 357 N.L.R.B. at 945–46 (requiring an “overwhelming community of interest”), *with* *PCC Structurals Inc.*, 365 N.L.R.B. No. 160, slip op. at 8 n.37 (2017) (requiring a proposed unit share a community of interest sufficiently distinct from the interests of employees excluded).

72. *Specialty Healthcare*, 357 N.L.R.B. at 945–46.

73. *Id.*

74. *PCC Structurals Inc.*, 365 N.L.R.B. No. 160, slip op. at 5 (Dec. 15, 2017).

75. *Id.* at 6.

76. *See infra* text accompanying note 108.

the other.<sup>77</sup> Furthermore, while there are separations that do exist between groups of employees, like separate lounges for different unions or different supervisors for different unions, those do not create a separation of consequence. For example, major decisions about wages and benefits are made by the senior management, not the middle management responsible for the daily enforcement of the CBA.<sup>78</sup>

Other industries recognize the integration of their work and have developed associations comprised of multiple unions that bargain together or wall-to-wall units. For example, a hotel experience is designed to be fully integrated for guests. A guest might check in at the front desk, stop at the bar for a drink, and enjoy room service in the morning. In New York and New Jersey, the New York Hotel and Gaming Trades Council represents employees across departments including “housekeeping, public space, dining room, banquet, room service, kitchen, stewarding, bar, mini-bar, audio-visual, front desk, reservations, PBX, bell and door services, concierge, night auditing, laundry, valet, engineering, maintenance, electrical, carpentry, painting, upholstery, business centers, night cleaning, health spas, security, garage, purchasing and receiving, and storeroom.”<sup>79</sup> To a lesser extent, the United Campus Workers strives to achieve a wall-to-wall union representing faculty, staff, graduate student workers, and undergraduate student workers at colleges and universities in the southern United States,<sup>80</sup> though there are often other unions representing other employees in the university setting.<sup>81</sup> In new organizing efforts, the Communications Workers of America and Game Workers Unite have focused on forming wall-to-wall units in the video game industry, with Game Workers Unite focused on promoting worker solidarity across different positions.<sup>82</sup> Overall, many industries recognize that integration best serves their constituents, though only a few have embraced the benefits by creating a specific wall-to-wall

---

77. Compare AGMA, *supra* note 6 (elaborating on the day-to-day life and training of an opera singer), with Mervyn Rothstein, *A Life in the Theatre: Broadway Carpenter Charlie Rasmussen*, PLAYBILL (Oct. 17, 2011), <https://www.playbill.com/article/a-life-in-the-theatre-broadway-carpenter-charlie-rasmussen-com-183579> [<https://perma.cc/ES6H-5EZU>] (elaborating on a career as a carpenter in the performing arts).

78. Sometimes direct supervision is provided by other union employees, making this even more complicated. See *supra* text accompanying notes 5, 16, and 20.

79. See generally NEW YORK HOTEL AND GAMING TRADES COUNCIL, <https://hotelworkers.org/about/affiliated-locals> [<https://perma.cc/UYV3-ZUL8>] (last visited Apr. 2, 2022).

80. See generally UNITED CAMPUS WORKERS, <https://www.unitedcampusworkers.org/> [<https://perma.cc/DDS9-WGQD>] (last visited Apr. 2, 2022).

81. See, e.g., Audrey Wang & Vishal Jammulapati, *Worker Unions at Duke, Explained*, CHRONICLE (Sept. 19, 2022), <https://www.dukechronicle.com/article/2022/09/duke-unions-graduate-students-faculty-duke-university-press-amalgamated-transit-union> [<https://perma.cc/JG6F-6BR9>] (discussing that Duke University recognizes unions including the American Federation of State, Council, and Municipal Employees Local 77; the Duke Faculty Union; the Amalgamated Transit Union Local 1328; and the Duke University Press Workers Union).

82. Sam Dean, *Major Union Launches Campaign to Organize Video Game and Tech Workers*, L.A. TIMES (Jan. 7, 2020), <https://www.latimes.com/business/technology/story/2020-01-07/major-union-launches-campaign-to-organize-video-game-and-tech-workers> [<https://perma.cc/SYC2-HDBQ>].

unit to negotiate on behalf of all employees within a facility; however, the constantly changing laws surrounding microunits in representation cases may deter unions from even trying.

Finally, the NLRA can be viewed as prioritizing the formation of wall-to-wall units over microunits. This interpretation is consistent with Congress's intent in adopting the NLRA. Congress enacted the Railway Labor Act (RLA) in 1926,<sup>83</sup> which focused on organizing employees by craft unit across multiple employers, like flight attendants or airplane mechanics,<sup>84</sup> allowing the union to bargain nationally with a single employer.<sup>85</sup> Yet, when the NLRA was enacted in 1935, it allowed for bargaining units of "the employer unit, craft unit, plant unit, or subdivision thereof,"<sup>86</sup> implying that a one-size-fits-all approach might not best serve employers or employees. Additionally, the NLRA is not designed to facilitate collective action across multiple employers.<sup>87</sup> Thus, even though a precedent existed under the RLA for craft units or microunits, the NLRA chose to pursue a different path, allowing for wall-to-wall units.<sup>88</sup> Therefore, it stands to reason that the NLRA recognized that there may be a better way forward than microunits or craft units for certain employers, and today, the performing arts is one of those industries.

## B. What is a Craft Unit?

A craft unit is a "distinct and homogeneous group of skilled journeymen craftsmen, who, together with helpers or apprentices, are primarily engaged in the performance of tasks which are not performed by other employees and which require the use of substantial craft skills and specialized tools and equipment."<sup>89</sup> The Board weighs the following factors when deciding whether a petitioned-for unit is a craft unit:

[W]hether the petitioned-for employees participate in a formal training or apprenticeship program; whether the work is functionally integrated with the work of the excluded employees; whether the duties of the petitioned for employees overlap with the duties of the excluded employees; whether the employer assigns work according to need rather than on craft or jurisdictional lines; and whether the petitioned-for employees share common interests with other employees, including wages, benefits, and cross-training.<sup>90</sup>

---

83. Railway Labor Act, 45 U.S.C. §§ 151–88.

84. Lynn Rhinehart & Celine McNicholas, *Collective Bargaining Beyond the Worksite*, ECON. POL'Y INST. (May 4, 2020), <https://www.epi.org/publication/collective-bargaining-beyond-the-worksite-how-workers-and-their-unions-build-power-and-set-standards-for-their-industries/> [<https://perma.cc/937N-CFH6>].

85. *Id.*

86. National Labor Relations Act, 29 U.S.C. § 159(b).

87. MARK BARENBERG, ROOSEVELT INST., WIDENING THE SCOPE OF WORKER ORGANIZING: LEGAL REFORMS TO FACILITATE MULTI-EMPLOYER ORGANIZING, BARGAINING, AND STRIKING 1, 3 (2015), <https://rooseveltinstitute.org/wp-content/uploads/2015/10/RI-Widening-Scope-Worker-Organizing-201510-2.pdf> [<https://perma.cc/5VC6-JGM4>].

88. *See* 29 U.S.C. § 159(b) (discussing possible units).

89. Burns & Roe Servs., 313 N.L.R.B. 1307, 1308 (1994).

90. *Id.*

When considering whether to allow a petitioned-for craft unit, “strict adherence to the standards established for craft severance [are] demanded” and should not be used for the “fractionalizing of existing harmonious bargaining relationships.”<sup>91</sup> Because of these heightened standards, craft unions are more difficult to form than microunits.

While initial performing arts unions may have formed as craft units, today they are more likely defined by a community of interest rather than traditional craft unit principles.<sup>92</sup> Formal training and apprenticeships vary widely, along with pay scales for varying roles within each unit.<sup>93</sup> However, there are some unions, like members of IATSE, that could constitute a craft unit, due to their extensive training as a carpenter or in another similar field.<sup>94</sup>

### C. Why Union Organizers Prefer Microunits And Issues With Microunits in The Performing Arts

When a layperson thinks about union organizing, it seems obvious that employees should want the biggest unit possible to wield the most power. If an entire plant is organized, versus just one department, the union will have greater leverage in negotiations with the employer, making all labor disruptions likely more effective.<sup>95</sup> However, unions are focused on *organizing* workers when determining what unit to pursue.<sup>96</sup> Smaller units are often easier to organize<sup>97</sup>—it is far easier to convince ten people to do something than 1,000 people. If the union organizers succeed in organizing the smaller unit, they can always attempt to organize other units or incorporate other workers into the previously created unit later.<sup>98</sup> Furthermore, larger units can sometimes include seasonal employees, where turnover can make it more difficult to successfully organize.<sup>99</sup> However, from a management perspective, smaller units may result in inefficient operations, different employees subject to different work rules, and varying compensation and benefits policies.<sup>100</sup> These problems are particularly prevalent

---

91. Gen. Motors Corp., 114 N.L.R.B. 234, 239 (1955) (Murdock, dissenting).

92. See Metro. Opera Ass'n Inc., 327 N.L.R.B. 740 (1999) (upholding the decision to keep choristers in the historical unit based on the idea that they share interests in common with other unit members).

93. See *supra* text accompanying note 9.

94. See NASRCC, *Training for a Career as a Union Carpenter*, YOUTUBE (Mar. 24, 2011), [https://www.youtube.com/watch?v=jM6TS6OUmkQ&ab\\_channel=NASRCC](https://www.youtube.com/watch?v=jM6TS6OUmkQ&ab_channel=NASRCC) [<https://perma.cc/TQ67-3468>] (describing the four-year apprenticeship program to join a non-performing arts carpenters' union).

95. See Neil W. Chamberlain, *Stabilization of Labor Relations?*, 396 ANNALS AM. ACAD. POL. & SOC. SCI. 79, 87 (1971) (discussing that a weak union will similarly have a weak strike).

96. See ESTREICHER & BODIE, *supra* note 36, at 104 (discussing union organization).

97. Ian Kullgren, *Labor Board to Revisit Bargaining Unit Size in Union Elections*, BLOOMBERG L. (Dec. 7, 2021), [https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/XE0SBTRO000000?bna\\_news\\_filter=daily-labor-report#jcite](https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/XE0SBTRO000000?bna_news_filter=daily-labor-report#jcite) [<https://perma.cc/7XNY-7DZH>].

98. See *supra* text accompanying note 12.

99. Ian Kullgren, *How a Trump-Era Labor Board Decision Curtails Union Organizing*, BLOOMBERG L. (July 20, 2021), [https://www.bloomberglaw.com/bloomberglawnews/in-house-counsel/X2ENHNS000000?bna\\_news\\_filter=in-house-counsel#jcite](https://www.bloomberglaw.com/bloomberglawnews/in-house-counsel/X2ENHNS000000?bna_news_filter=in-house-counsel#jcite) [<https://perma.cc/32E5-MECQ>].

100. *Id.*

in the performing arts, where tight budgets and spontaneous creativity drive decisions.

Microunits in the performing arts can prove particularly frustrating for directors and companies focused on nimble productions. Consider the director who likes the aesthetic of chorus members assisting with a scene change, rather than stagehands in all black moving scenery or props, or the concert production that has a ten-day rehearsal period and finds itself battling conflicting break and day off rules. How do these situations resolve?

First, let us consider the opera director who wants a scene transition with chorus members moving furniture. What happens if all the choristers are sitting in chairs in a scene? It seems logical that when fifty people are exiting the stage that they each take their chair with them to make the scene change faster. Someone in management looks at the CBA, and there is no objection to moving a chair within the choristers' agreement. But it is the stagehands' job to turn over the stage between scenes, not the choristers. However, what if there is no blackout to turn over the stage and the director wants the choristers to make the change because they are in costume, allowing for a faster and more aesthetically pleasing scene change? That seems like a logical solution until someone in management reads the stagehands' CBA and realizes that stagehands can wear costumes for an entire performance.<sup>101</sup> While the issue of costuming appears to have a solution, it does not address the additional time required to make the scene change. Further, costuming the stagehands requires a premium payment, thereby increasing production costs both through this payment and by requiring additional costumes.<sup>102</sup> Even more challenging for the director is if the CBA articulates stage turnover as the stagehand's responsibility with no exception for the occasional set piece movement by a non-stagehand. The director may have no choice but to use the costumed stagehands and to pay a premium for every show, even if this does not entirely fit within his or her vision or the budget.

Alternatively, consider the composer who creates an eighty-minute theatrical production with no intermission. What if the director wants to start the rehearsal with a non-stop run through for the first rehearsal? Typically, Equity actors need five minutes of break for every fifty-five minutes of rehearsal or ten minutes of break after eighty minutes of rehearsal.<sup>103</sup> Plus, the actors need a one-and-a-half-hour break after five hours of rehearsal.<sup>104</sup> Orchestra contracts vary from orchestra to orchestra as to breaks, but consider the following break provision:

---

101. See, e.g., *Stagehand General Conditions*, FOX THEATRE (Jan. 1, 2017), <https://www.foxtheatre.org/assets/doc/Pg.-6-12-Stagehand-General-Conditions-ca52f4b6f5.pdf> [<https://perma.cc/W3H9-WRCD>] (requiring a premium payment for a stagehand to wear formal attire or a costume).

102. See *id.* (stipulating a twenty-five dollar per performance fee for a show-specific costume).

103. Zachary Pincus-Roth, *Exploring the Differences Between Rehearsals for Broadway and Community Theatre Productions*, PLAYBILL (Sept. 21, 2007), <https://www.playbill.com/article/ask-playbillcom-rehearsals-com-143921> [<https://perma.cc/7VCW-CFL9>].

104. *Id.*

For rehearsals in a rehearsal room,<sup>105</sup> break-time shall accumulate at a rate of ten (10) minutes per hour, and all breaks, except those at the conclusion of rehearsals, shall be at least fifteen (15) minutes in length. For rehearsals of three (3) hours, musicians shall not be required to sit for more than fifty (50) minutes at a time. For rehearsals of two and one-half (2-1/2) hours and rehearsals of four (4) hours, musicians shall not be required to sit for more than seventy (70) minutes at a time. For all other rehearsal lengths, musicians shall not be required to sit for more than sixty (60) minutes. Notwithstanding the preceding, if, in the determination of the Orchestra Manager, the rehearsal efficiency would be substantially improved, musicians may be required to sit for an additional five (5) minutes. At the time a break is due, a conductor may announce he/she wishes to continue rehearsing into the break period. If this option is invoked, the rehearsal shall then end no later than fifteen (15) minutes after the break would have started.<sup>106</sup>

So, what if the director wants to start the rehearsal with a non-stop run through for the first rehearsal? Under the Equity break rules, the director could. However, under the AFM rules, that is not allowed. Because of the nature of collective bargaining, the members of the AFM likely have limited understanding of all the different break rules across all the different unions involved with any production, and their collective bargaining process is focused on protecting their own constituents' break times.<sup>107</sup> However, having non-complementary work rules across unions representing different people doing the same work creates inefficiencies. Additionally, work rules that create the best working environment through efficiencies may be passed over for more pressing concerns about wages and benefits.

These issues will likely only become more prevalent in the future. The performing arts continue to integrate more roles to push the bounds of creativity and conform to budgetary needs. For example, in recent years, more musicals have had actors take on the role of orchestra, in addition to performing a full role.<sup>108</sup> In 2005, a production of *Sweeney Todd* featured a cast of ten actors who played all the roles and provided the musical accompaniment, including Patti LuPone as a tuba and percussion playing Mrs. Lovett.<sup>109</sup> While this practice had been utilized in prior musicals, this *Sweeney Todd* revival seemingly kicked off a phase of musicals fully integrating actors and orchestra.<sup>110</sup>

---

105. Notably, the orchestra's rules are for when they are rehearsing in a rehearsal room, meaning that if they are rehearsing on stage, the rules are different. Imagine finally getting a director to understand the break schedule in the rehearsal room, only to have to explain an entirely new break schedule in a few days, while the actors maintain the same break schedule.

106. *Kennedy Center Opera House Orchestra CBA 2018–21*, DC FED'N OF MUSICIANS (Aug. 31, 2018), <https://www.musiciansdc.org/wp-content/uploads/2020/12/KCOHO-CBA-2018-2021.pdf> [<https://perma.cc/KV8C-USEV>].

107. Temperature control, access to the stage or pit, using recorded tracks for performances, and personal item storage can all similarly conflict across CBAs and lead to unsolvable problems.

108. See Logan Culwell-Block, *9 Broadway Shows Where the Actors Were Also Their Own Orchestra*, PLAYBILL (Sept. 21, 2018), <https://playbill.com/article/9-broadway-shows-where-the-actors-were-also-their-own-orchestra> [<https://perma.cc/UXS9-X4Q7>] (discussing nine Broadway shows using actors who both perform specific roles and serve as the orchestra).

109. *Id.*

110. These productions included both revivals of classic shows that normally have a Broadway pit orchestra, like *Company* and *Into the Woods*, but other shows were created with the intention of the

While these productions are a breath of fresh air in the industry, there are extra hoops to jump through to create a self-contained musical that can tour across the United States. For example, the AFM's Pamphlet B Rule 24 outlines the requirements for hiring touring musicians, who travel with the company to every city on the tour, versus local musicians.<sup>111</sup> Rule 24 also outlines the exceptions for fully self-contained orchestras, where no local musicians are used, and a partially self-contained sub unit, where more touring musicians are allowed than usual.<sup>112</sup> While many productions have successfully received AFM self-contained status under Pamphlet B, smaller tours without major producers, like Disney, may struggle.<sup>113</sup> Ultimately, this limits the prospect of touring because an actor-orchestra tour would need to negotiate with both the AFM and Equity at any union house. Moreover, the AFM has full discretion in refusing to grant approval to a self-contained tour.<sup>114</sup> The AFM is within its rights to change its current position and turn against self-contained productions.<sup>115</sup> Innovative productions require cooperation across management and unions, which can be difficult when each union has different workers and different interests to protect.<sup>116</sup>

It is easy to imagine other situations where an integrated industry could struggle with microunits. Imagine a hotel with only housekeepers on strike.<sup>117</sup> A

---

actors performing as the orchestra, such as *The Band's Visit*, *Bandstand*, and *Once*, to name a few. *Id.*; *First Look at the National Tour of Into the Woods*, PLAYBILL (Nov. 29, 2016), <https://www.playbill.com/article/first-look-at-the-national-tour-of-into-the-woods> [<https://perma.cc/8M8V-QGA9>]. Yet, other shows, like *Ain't Too Proud*, include the musicians dancing along with the cast in the finale.

111. Rule 24 explains that engagements of one week or less may be completely self-contained, engagements ranging from more than one week and up to six weeks may have up to five traveling musicians, and engagements of more than six weeks may have up to three traveling musicians. RAYMOND M. HAIR, JR., AM. FED'N OF MUSICIANS OF THE U.S. & CAN., PAMPHLET B AND SHORT ENGAGEMENT TOURING THEATRICAL MUSICALS: MARCH 12, 2016 – MARCH 15, 2020 33, <https://www.afm.org/wp-content/uploads/2017/07/Pamphlet-B-16-20.pdf> [<https://perma.cc/QL5N-KMY2>] [hereinafter PAMPHLET B].

112. In determining a self-contained unit, the Federation President must determine “whether the musicians are an integral part of the show.” Commercial production touring orchestras may be fully self-contained, meaning that all of the musicians tour with the production, or a partially self-contained sub-unit, meaning that there are a mix of local and touring musicians. The AFM recognizes that shows like *Bring in Da Noise*, *Bring in Da Funk*; *Best Little Whorehouse in Texas*; *Jersey Boys*; and *Once* meet the definition of a fully self-contained show. Similarly, the Federation will make an exception allowing for a partially self-contained sub-unit for musician(s) playing a special, unique instrument(s), like African percussion in *The Lion King* or Asian flutes in *Miss Saigon*. *Id.*

113. These smaller attempted tours are often non-union, which the author does not condone. However, they do exist and require acknowledgment.

114. See PAMPHLET B, *supra* note 111 (discussing the process for determining a self-contained orchestra).

115. See National Labor Relations Act, 29 U.S.C. § 158(d) (providing for changes in position in collective bargaining).

116. See Josh Loar, *It's Time for a New Labor Movement in the Performing Arts*, CURRENT AFFS. (July 29, 2020), <https://www.currentaffairs.org/2020/07/its-time-for-a-new-labor-movement-in-the-performing-arts> [<https://perma.cc/H9Z8-Y9ZY>] (discussing how the “profusion of unions” can make it difficult to gather workers to fight for better conditions).

117. See Alexia Fernández Campbell, *Marriott Workers Just Ended the Largest Hotel Strike in US*

guest will have no linens, and the restaurant will have no tablecloths. The hotel lobby will be covered with candy wrappers dropped by children, and the pool will have old Band-Aids on the pool deck. A hotel would struggle to operate with its housekeepers on strike because they are integrated with bartenders, servers, valets, and ultimately the guests. If multiple bargaining units within a coalition already serve hotel workers, taking this idea one step further to create wall-to-wall units within the performing arts appears feasible.

Thus, while microunits served a purpose to protect various members of the performing arts throughout history, as the industry's performing standards gain complexity, a new way forward is necessary.<sup>118</sup>

#### D. The Solution: Wall-to-Wall Units

Wall-to-wall units provide a better solution for the performing arts moving forward. In recent history, wall-to-wall units have often been opposed by union supporters because it is easier to organize microunits.<sup>119</sup> But ease of organization is not the best reason to choose a unit that will last until a company declares bankruptcy or until the employees decertify the union. A performing arts union that encompassed all the workers—actors, musicians, stagehands, ticket sellers, front of house, and the other employees—would have more power to bargain with the employer.<sup>120</sup> From the employer's perspective, a wall-to-wall unit only comes into the workplace if it is truly what the majority of workers vote for.<sup>121</sup> It avoids a splintering of units, each with their own priorities and in conflict with each other. It also allows for the employer to make its requests to one collective voice, versus multiple units and unions representing many different voices.

For inspiration, the performing arts should look to their visual arts neighbors. Inspired by an excel spreadsheet listing the salaries of museum workers across the country, Philadelphia Museum Workers voted to unionize, becoming the first wall-to-wall museum union in the country in August 2020.<sup>122</sup> In the wake of

---

*History*, VOX (Dec. 4, 2018), <https://www.vox.com/policy-and-politics/2018/12/4/18125505/marriott-workers-end-strike-wage-raise> [<https://perma.cc/MN6Q-L9ZD>] (discussing a recent hotel strike).

118. While the previous examples were in the context of opera and musical theater, ballet companies and symphonies have also become more complex. For example, ballet companies, like New York City Ballet, may perform pieces to electronic music. Most electronic music lacks an orchestral score, though ballet traditionally requires an orchestra. Alternatively, virtually every American symphony has a Pops Series with newer music, which sometimes incorporates actors, comedians, light shows, or other flashy elements to entice new audience members. Gone are the days of traditional art forms adhering only to traditional works.

119. Kullgren, *supra* note 97.

120. *See infra* note 146.

121. *See* ESTREICHER & BODIE, *supra* note 36, at 104 (articulating the procedure required to form a union).

122. The Philadelphia Museum's union represents any worker who works more than four hours a week at the museum. Eighty-nine percent of workers voted to unionize in the representation election. Part of the success was due to management's desire to split employees as core and non-core employees, which workers found insulting. Taylor Dafoe, *Days After More Than 80 Philadelphia Museum of Art Employees Were Laid Off, the Institution's Workers Have Voted to Unionize*, ARTNET (Aug. 6, 2020), <https://news.artnet.com/art-world/philadelphia-museum-of-art-union-vote-1900323>



COVID-19 layoffs across the arts industry, other museum workers across the country were inspired by this success and followed suit in organizing efforts, and many also pursued wall-to-wall units due to the Philadelphia Museum workers' newly set precedent.<sup>123</sup> Museums are less heavily unionized than the performing arts, but if curators and gift shop staff can form one unit, so can parking attendants and opera divas.

#### E. Benefits And Burdens of Wall-to-Wall Units

When considering the benefits of a wall-to-wall unit, one area specifically stands out: diversity and inclusion. While economic gains are a driving factor of unionization, both arts workers and management want more diversity in hiring and operations.<sup>124</sup> Because classical music is dominantly written, performed, and produced by white people,<sup>125</sup> more diversity may exist in positions across performing arts institutions.<sup>126</sup> A wall-to-wall unit could implement more robust diversity initiatives with a focus towards inclusion, whereas many dominantly white groups struggle to step beyond diverse recruitment.<sup>127</sup> This is also important

---

[<https://perma.cc/2C5Y-7BCR>].

123. Unionizing efforts followed at various New York City museums, including the Whitney Museum, Hispanic Society, Guggenheim, Museum of Modern Art, Tenement Museum, and New Museum. Wallace Ludel, *Employees at the Whitney and Hispanic Society Seek to Unionise*, ART NEWSPAPER (May 18, 2021), <https://www.theartnewspaper.com/2021/05/18/employees-at-the-whitney-and-hispanic-society-seek-to-unionise> [<https://perma.cc/5WE6-NYPU>]; Hakim Bishara, *Brooklyn Academy of Music Employees Vote in Favor of Union*, HYPERALLERGIC (June 13, 2019), <https://hyperallergic.com/505184/bam-union-vote/> [<https://perma.cc/K35P-QCHY>]. The Whitney Museum, Walters Art Museum, Museum of Fine Arts (Boston), Milwaukee Art Museum, and numerous other museum employees sought to join a union as a wall-to-wall unit, and some succeeded. See Kenneth Quinnell, *What's New at Museums This Year? Labor Unions.*, AFL-CIO (Dec. 16, 2020), <https://aflcio.org/2020/12/16/whats-new-museums-year-labor-unions> [<https://perma.cc/B8AV-Y77F>] (discussing unionization at various museums); Josh Landes, *MASS MoCA Workers Vote to Unionize*, WAMC NE. PUB. RADIO (Apr. 28, 2021), <https://www.wamc.org/new-england-news/2021-04-28/mass-moca-workers-vote-to-unionize> [<https://perma.cc/Z5WM-MM6P>] (discussing MASS MoCA's new wall-to-wall unit).

124. Margaret Carrigan, *With Unemployment at an Historic High, America's Art Workers Band Together*, ART NEWSPAPER (Sept. 4, 2020), <https://www.theartnewspaper.com/news/with-unemployment-on-the-rise-art-workers-unionise> [<https://perma.cc/7K67-JL4Q>]; see Kevin Williams, *Talk is cheap. What are Arts Organizations Doing About Diversity and Inclusion?*, CHI. TRIB. (Sept. 28, 2020), <https://www.chicagotribune.com/entertainment/ct-ent-diversity-inclusion-liststory-20200928-cpymnh5sjfirlao7rns6lymfda-list.html> [<https://perma.cc/GTE9-R8YB>].

125. Tom Huizenga, *Why Is American Classical Music So White?*, NPR (Sept. 20, 2019) <https://www.npr.org/sections/deceptivecadence/2019/09/20/762514169/why-is-american-classical-music-so-white> [<https://perma.cc/56DU-B4DR>].

126. Positions as an usher or as a parking attendant are lower-paying jobs. People of color are overrepresented in lower-paying jobs. Gena Cox & David Lancefield, *5 Strategies to Infuse D&I into Your Organization*, HARV. BUS. REV. (May 19, 2021), <https://hbr.org/2021/05/5-strategies-to-infuse-di-into-your-organization> [<https://perma.cc/3ZCF-B89B>]. Thus, by including lower-paid employees in a wall-to-wall unit, more diverse voices should exist in votes for initiatives and proposals.

127. SUNDIATU DIXON-FYLE, KEVIN DOLAN, VIVIAN HUNT & SARA PRINCE, MCKINSEY & CO., DIVERSITY WINS 30 (2020), <https://www.mckinsey.com/~media/mckinsey/featured%20insights/diversity%20and%20inclusion/diversity%20wins%20how%20inclusion%20matters/diversity-wins-how-inclusion-matters-vf.pdf> [<https://perma.cc/6JBB-YCRA>].

to donors and funders.<sup>128</sup> Considering 75% of Americans support workplace diversity,<sup>129</sup> if arts organizations want to continue to be successful, policies for workplace diversity and inclusion must be consistent and supported across management and the unions. However, to achieve this goal, policies must be implemented consistently across unions, which could take years in an organization with numerous microunits on various CBA cycles.<sup>130</sup> With a wall-to-wall unit, the policy will come up once and be negotiated at that time. The employees will have to work together with management, versus as fractured groups, to find a policy amenable to a majority of workers. As a further example, in the context of the COVID-19 pandemic, bargaining as a wall-to-wall unit would allow all workers to assert their needs regarding health and safety policies, as well as understaffing.<sup>131</sup>

There is one significant disadvantage to a wall-to-wall unit for both the employer and the union. A wall-to-wall unit would make for one single but incredibly complex negotiation.<sup>132</sup> The union's bargaining committee would likely need to be far larger to ensure all workers' needs are met, and management would have to get more managers into the room and working together for solutions. However, the benefits seem to outweigh the burdens for both sides.

### 1. Benefits And Burdens For The Employer

From a management perspective, one might imagine that a wall-to-wall unit, if successfully implemented, creates more headaches. More workers may successfully unionize, and if labor strife occurs, there is truly no chance at a performance occurring. However, while this is all possible, the benefits of a wall-to-wall unit outweigh these burdens.

---

128. See *New National Study of State and Local Arts Agencies Finds Many Grants Lack Wage Requirements That Could Make Industry More Inclusive*, ACTORS' EQUITY (Dec. 14, 2021), <https://actorsequity.org/news/PR/PublicArtsFundingReport/> [<https://perma.cc/SMW5-EETJ>] (stating that eighty-two percent of the nation's largest state and local arts agencies evaluate candidates on some kind of diversity and inclusion criteria).

129. Juliana Menasce Horowitz, *Americans See Advantages and Challenges in Country's Growing Racial and Ethnic Diversity*, PEW RSCH. CTR. (May 8, 2019), <https://www.pewresearch.org/social-trends/2019/05/08/americans-see-advantages-and-challenges-in-countrys-growing-racial-and-ethnic-diversity/> [<https://perma.cc/K4EC-59DK>].

130. For example, a labor lawyer may negotiate four-year agreements for each IATSE, AGMA, and AFM. To ensure each union is on a different cycle, they would plan for IATSE to come up for renegotiation in 2022, AGMA to come up for renegotiation in 2023, and AFM to come up for renegotiation in 2024.

131. For example, during the pandemic, the wall-to-wall union at the Philadelphia Museum of Art created a health and safety committee to discuss issues that "management staff who were working from home weren't necessarily thinking about." Karen Chernick, *The First 'Wall to Wall' Museum Union in the US Turns One Year Old*, ART NEWSPAPER (May 23, 2021), <https://www.theartnewspaper.com/2021/05/24/the-first-wall-to-wall-museum-union-in-the-us-turns-one-year-old> [<https://perma.cc/FES6-C9XP>].

132. See Carly Duvall, *Making Friends of Foes: Bringing Labor and Management Together Through Integrative Bargaining*, 2009 J. DISP. RESOL. 197, 197 (2009) (stating that collective bargaining is additionally complicated due to the relationships of the individuals bargaining over several generations and who must continue to negotiate in the future).

First, a wall-to-wall unit requires that a majority of the petitioned-for workforce votes to recognize the union as the exclusive bargaining representative.<sup>133</sup> If the union cannot convince a majority of the workforce of the union's value, then the NLRB will not certify the new unit.<sup>134</sup> Furthermore, even if the union manages to win the vote, management and the union must negotiate an initial CBA.<sup>135</sup> While it may seem dramatic to have an “all in” or “all out” union, it is fundamental that unions protect workers' rights but also allow the performing arts to have as much business predictability and flexibility as possible.

Second, one giant negotiation would save transaction costs around the negotiation, namely in the area of attorneys' fees.<sup>136</sup> As discussed earlier, performing arts organizations often run their union negotiations in cycles, meaning that every year an organization must negotiate with whichever unions' CBAs are expiring and up for negotiation.<sup>137</sup> Each negotiation can require an attorney. Because most arts organizations are non-profits, if less money goes to attorneys for negotiations, more money goes towards mission-driven activities, like hiring soloists or utilizing a larger string count in the orchestra. Arts workers directly implement the mission of a performing arts organization; thus, the workforce and organization only benefit from money going towards the mission of the organization rather than attorneys' fees. Additionally, donors and grant-makers like to see their money being used for mission-driven activities that they can physically see, rather than expenses to “keep[] the lights on.”<sup>138</sup>

Moreover, transaction costs will be reduced when all members of management discuss proposals. It is too easy for one department to negotiate with a smaller unit and agree to a specious proposal. For example, an operations manager could agree that a stagehand will be present thirty minutes prior to a performance for any last-minute musician needs. That seems like a simple fix. However, the production director, who manages the stagehands, may need the stagehands thirty minutes before a show call for final safety checks or a required union break. Now, the operations manager has agreed to a costly proposal that may require the production director to hire an extra person for each show, even though the operations manager failed to ever communicate this change in terms with the production director. In a large negotiation, those two managers are likely to be in the same meeting and not make this mistake. Thus, by reducing

---

133. National Labor Relations Act, 29 U.S.C. § 159(a).

134. *Id.*

135. ESTREICHER & BODIE, *supra* note 36, at 104.

136. Negotiating a collective-bargaining agreement takes countless hours, and with partners at top firms billing over \$1,000 per hour, the costs can quickly add up. See David J. Przybylski, *How Long Does It Take To Negotiate a Union Contract?*, BARNES & THORNBURG (July 13, 2021), <https://btlaw.com/en/insights/blogs/labor-relations/2021/how-long-does-it-take-to-negotiate-a-union-contract> [https://perma.cc/DA7L-7JQK].

137. See *supra* text accompanying note 130.

138. See *7 Reasons Why People Donate & How to Appeal to Their Motives*, NETWORK FOR GOOD (last visited Apr. 2, 2022), <https://www.networkforgood.com/resource/7-reasons-why-donors-give/> [https://perma.cc/N772-BXK6] (discussing what donors seek when choosing to donate to an organization).

transactional costs of negotiations, more money will go towards the mission-driven activities of a performing arts organization.

Finally, wall-to-wall units have the potential to end longstanding practices that favor specific performing arts unions, at the cost of flexibility and advancement. First, the practice of hiring “walkers”<sup>139</sup> exclusively benefits one union, the AFM, when these fees could go towards other mission-generating activities.<sup>140</sup> More specifically, when a touring production, whether covered by AFM Pamphlet B or not, decides that they would rather use a touring musician over a required local musician, a walker must be hired.<sup>141</sup> The walker completes no work, but the employer must pay the local walker to meet the stipulated minimums outlined in its CBA or Pamphlet B.<sup>142</sup> This practice ultimately results in less money for mission-driven activities.<sup>143</sup> Furthermore, this significant benefit to one group would likely fall by the wayside in exchange for broader provisions for the whole bargaining unit in a wall-to-wall unit. Similarly, walker-type fees for technology advances for ticket sellers, electronic music for musicians, electronic marquees for stagehands, and automated parking gates for parking attendants could similarly be negotiated with the organization’s overall mission in mind, rather than trying to protect jobs that may simply no longer be necessary for the growth of the arts.<sup>144</sup>

When considering the burdens of a wall-to-wall unit for management, the reality exists that a wall-to-wall unit could become very powerful. This is particularly disappointing for the employer if the prior microunits or craft units were weak.<sup>145</sup> However, the benefits seemingly outweigh the concerns that the union might ultimately be more effective in furthering its goals.

---

139. See Donald G. McNeil Jr., *New Show Is First Not To Have To Pay Idle Musicians*, N.Y. TIMES (Feb. 8, 1995), <https://www.nytimes.com/1995/02/08/theater/new-show-is-first-not-to-have-to-pay-idle-musicians.html> [<https://perma.cc/D2BM-BQ5A>] (defining a walker as a musician who does not perform in a show and “walks in only to pick up their checks” because the show failed to utilize the minimum orchestra size).

140. See Mindy Schwartz, *The American Federation of Musicians: An Unearned Encore for Featherbedding*, 47 WAYNE L. REV. 1339, 1359–61 (2001) (describing the history and practice of walkers and musician minimums).

141. *Id.* at 1355.

142. *Id.*

143. See *id.* at 1362 (elaborating on walker fee costs, though the dollar amounts are outdated).

144. Christopher Milazzo, *A Swan Song for Live Music?: Problems Facing the American Federation of Musicians in the Technological Age*, 13 HOFSTRA LAB. L.J. 557, 567–70 (1996) (discussing the practice of walkers within the context of technological advances). This issue arises in a variety of industries as technological advances occur and unions attempt to protect workers’ jobs. See, e.g., Melissa Repko, *As More Retailers Turn to Tech, Macy’s Store Employees Score Victory in Challenging Self-Checkout in Mobile App*, CNBC (Apr. 30, 2021), <https://www.cnbc.com/2021/04/30/macys-store-employees-score-victory-in-challenging-self-checkout-.html> [<https://perma.cc/LX88-BFXK>].

145. A weak union has weak strike power. Chamberlain, *supra* note 95. If a union is unable to use its strongest economic weapon, management benefits. ESTREICHER & BODIE, *supra* note 36, at 157–58.

## 2. Benefits And Burdens For The Workers

Aside from the overall benefits for implementation of diversity and inclusion initiatives, unions also gain power with a wall-to-wall unit. If all the constituents in a wall-to-wall unit work together, then the union's leverage increases, and the union can more effectively demand change.<sup>146</sup> This potential for strength and union solidarity drove the SAG-AFTRA merger, leading to the largest single performing arts union.<sup>147</sup> From increased wages to improved benefits, employees who stand together wield more power to advocate for themselves.<sup>148</sup> An all-inclusive unit also eliminates the politics of being in a more or less powerful union.<sup>149</sup> A powerful union can create a near work stoppage by itself sometimes, making its power to strike and bargain for itself naturally stronger.<sup>150</sup> By protecting all workers, the politics of belonging to the most powerful union melt away. Larger unions also have a larger pool of people for internal committees and can ultimately use their size to achieve better rates on benefits and services, such as health insurance plans and pension administration. If the employer fails to meet the union's demands, the chances of a successful strike from the union's perspective are also higher.<sup>151</sup> While an employer has the right to permanently replace workers involved in an economic strike,<sup>152</sup> it would be extremely difficult and costly to replace an entire workforce, particularly in the arts. Furthermore, in 2022, employers could barely recruit enough people for their current workplace needs.<sup>153</sup> The option to permanently replace a whole workforce, with

---

146. See Elton Rayack, *The Impact of Unionism on Wages in the Men's Clothing Industry, 1911-1956*, 9 LAB. L.J. 674, 683 (1958) (discussing the positive impact of a strong union on clothing workers' wages during the Great Depression); see generally *Factsheet: How Strong Unions Can Restore Workers' Bargaining Power*, EQUITABLE GROWTH (May 1, 2020), <https://equitablegrowth.org/factsheet-how-strong-unions-can-restore-workers-bargaining-power/> [<https://perma.cc/45SY-RB4U>].

147. Loar, *supra* note 116. SAG-AFTRA represents all professional film and television actors.

148. JOSH BIVENS ET AL., ECON. POL'Y INST., HOW TODAY'S UNIONS HELP WORKING PEOPLE 14 (2017), <https://files.epi.org/pdf/133275.pdf> [<https://perma.cc/7KNV-4AZQ>]; see ANDREW KOHUT, CARROLL DOHERTY, MICHAEL DIMOCK & SCOTT KEETER, PEW RSCH. CTR., LABOR UNIONS SEEN AS GOOD FOR WORKERS, NOT U.S. COMPETITIVENESS 2 (2011), <https://www.pewresearch.org/politics/2011/02/17/labor-unions-seen-as-good-for-workers-not-u-s-competitiveness/> [<https://perma.cc/H83V-P4TY>] (discussing American's belief that labor unions have a positive impact on unionized workers wages and benefits).

149. However, while politics across unions may be reduced, the internal politics may be increased. Unions already struggle with internal politics. See, e.g., Steven Greenhouse, *Infighting Distracts Unions at Crucial Time*, N.Y. TIMES (July 8, 2009), <https://www.nytimes.com/2009/07/09/business/09labor.html> [<https://perma.cc/KSJ5-4NXQ>].

150. See Rayack, *supra* note 146.

151. Jacob Bogage, *Strikes are Sweeping the Labor Market as Workers Wield New Leverage*, WASH. POST (Oct. 17, 2021), <https://www.washingtonpost.com/business/2021/10/17/strikes-great-resignation/> [<https://perma.cc/CS9A-FQF7>].

152. An economic strike occurs when a union strikes at the conclusion of a CBA, but an unfair labor practice (ULP) strike occurs when members of a union refuse to work because the employer has committed a ULP. Employers may permanently replace economic strikers but only temporarily replace ULP strikers. ESTREICHER & BODIE, *supra* note 36, at 158–59.

153. Abha Bhattarai, *Worker Shortages are Fueling America's Biggest Labor Crisis*, WASH. POST (Sept. 16, 2022), <https://www.washingtonpost.com/business/2022/09/16/worker-shortage-strikes-economy/> [<https://perma.cc/C8F9-E5AC>]; see David Leonhardt, *Where Are the Workers?*, N.Y. TIMES

the necessary skills and expertise to mount an intricate production, does not currently exist.<sup>154</sup>

When considering the burdens of a wall-to-wall unit, unions may prefer to start with a small unit and gradually increase their membership across an employer over time.<sup>155</sup> However, ease of organization should not be the only factor considered when the union's ultimate goal is to further the workers' rights. While there may be some concerns that factions still exist in a wall-to-wall unit and some workers voices may not be valued or heard,<sup>156</sup> like many issues, that probably depends on the management style of the local union and committee representatives.

Thus, in the performing arts, lawyers and union organizers should focus on the benefits of wall-to-wall units to usher in a new era of the performing arts.

### III

#### THE NLRB WANTS TO STRENGTHEN THE MICROUNIT AND THE CRAFT UNIT

The NLRB wants to make it easier for microunits to form. In recent months, the NLRB began evaluating whether to make it easier for employees to form smaller units, whether through microunits or craft units. In December 2021, the Board granted review of two cases, *American Steel Construction, Inc.*<sup>157</sup> and *Nissan North America, Inc.*<sup>158</sup> By taking both cases for review within a few weeks of each other, the Board signaled a possible return to earlier precedents, making it easier for union organizers to pursue the organization of smaller units as opposed to wall-to-wall units.

#### A. Reviewing The Standard For Microunits And Craft Units

First, the Board granted review of *American Steel*, examining the standard for microunits. In this case, the union filed a petition seeking representation of full-time and part-time journeymen and apprentice field ironworkers, but the employer asserted that the appropriate unit should include its fabrication shop employees, painters, and drivers—essentially arguing for a wall-to-wall unit.<sup>159</sup>

---

(Nov. 3, 2021) (discussing the current labor shortage), <https://www.nytimes.com/2021/10/20/briefing/labor-shortage-us-low-wage-economy.html> [https://perma.cc/YT3D-UUMY]; Zachary Small, *The Hard-Hit Arts Sector Is Facing a Brain Drain as Ambitious Workers Seek Greener Pastures*, ARTNET (Sept. 15, 2020), <https://news.artnet.com/art-world/art-industry-brain-drain-1907518> [https://perma.cc/6ZK6-QDXE] (discussing the exodus of arts workers).

154. Bhattarai, *supra* note 153.

155. See Fox, Theodore & Kelly, *supra* note 33 (discussing how by enhancing a union's ability to enter an employer's workplace, it is easier to organize employees).

156. See Jeffrey S. Follett, *The Union as Contract: Internal and External Union Markets After Pattern Makers'*, 15 BERKELEY J. EMP. & LAB. L. 1, 21 (1994) (discussing that a majority faction of unskilled workers could demand a strike for higher wages and could choose to not make any demands on behalf of the minority skilled workers).

157. Am. Steel Constr., Inc., 371 N.L.R.B. No. 41, slip op. at 1 (Dec. 7, 2021).

158. Nissan N. Am., Inc., 371 N.L.R.B. No. 43, slip op. at 1 (Dec. 21, 2021).

159. Am. Steel Constr., Inc., 371 N.L.R.B. No. 41, slip op. at 1 (Dec. 7, 2021).

The Board sought input on either returning to the *Specialty Healthcare* test, maintaining the *PCC Sturcturals/Boeing* test, or pursuing an altogether new test.<sup>160</sup> Ultimately, just over a year later, the board reverted to the *Specialty Healthcare* test.<sup>161</sup> The case was remanded back to the Regional Director to evaluate the facts under this revised standard.<sup>162</sup>

Second, just a few weeks after deciding to re-examine microunit determinations, the Board granted review of the craft unit standard in *Nissan*.<sup>163</sup> The question on review is whether eighty-seven Tool and Die Maintenance Technicians at Nissan's plant are an appropriate craft unit, as opposed to a wall-to-wall unit of approximately 4,300 production workers across the Tennessee plant.<sup>164</sup>

In taking *Nissan* for review shortly after *American Steel*, the Board also appears to consider altering the craft unit standard. The union asserts that the Board holds a standard that all tool and die workers are craft employees.<sup>165</sup> However, the cases they cite forget that the tool and die workers of yesteryear had the skills to both repair *and fabricate* the tools and dies required to design Nissan's cars.<sup>166</sup> Today, Nissan's Tool and Die Maintenance Technicians do not make or fabricate dies. Rather the dies are made in Japan, with the Tennessee workers merely knowing how to repair the dies.<sup>167</sup> Furthermore, the Tool & Die Workers at Nissan are not the highest paid employees and do not complete formal apprenticeship programs, as seemingly required by Board precedent.<sup>168</sup> Breaking with this precedent, the Democratic majority took the case on for review, seemingly to lower the standard to become a craft unit.

---

160. *Id.*

161. *Am. Steel Constr., Inc.*, 372 N.L.R.B. No. 23, slip op. at 1 (Dec. 14, 2022).

162. *Id.* at 14. No decision has been reached by the Regional Director at the time that this Note was sent to the printer for publication.

163. *Nissan N. Am., Inc.*, 371 N.L.R.B. No. 43, slip op. at 1 (Dec. 21, 2021). No decision has been reached by the Regional Director at the time that this Note was sent to the printer for publication.

164. Ian Killgren, *Machinists Challenge NLRB Ruling on Size of Nissan Union Election*, BLOOMBERG L. (June 14, 2021), <https://news.bloomberglaw.com/daily-labor-report/machinists-challenge-nlr-ruling-on-size-of-nissan-union-election> [<https://perma.cc/6K7U-4XYF>].

165. *Nissan N. Am., Inc.*, 371 N.L.R.B. No. 43, slip op. at 1 (Dec. 21, 2021).

166. *See* *Jefferson Elec. Co.*, 80 N.L.R.B. 6, 7 (1948) (holding that “tool and die makers fabricate and repair tools, dies, jigs, and fixtures”); *Gen. Elec. Co.*, 101 N.L.R.B. 1341, 1342 (1952) (holding that tool and die makers “fabricate and repair tools, dies, jigs, and fixtures”); *Dazey Corp.*, 77 N.L.R.B. 408, 411 (1948) (holding that the petitioned-for workers “fabricate and repair” tools and dies).

167. *Opposition to Request for Review of Decision and Direction of Election*, *supra* note 55, at 13.

168. The Board has previously defined an appropriate tool and die craft unit. *See* *Jefferson Elec. Co.*, 80 N.L.R.B. 6, 7 (1948) (discussing that tool and die makers are the highest paid employees and must serve a four-year apprenticeship); *Gen. Elec. Co.*, 101 N.L.R.B. 1341, 1342 (1952) (discussing that tool and die makers are the highest paid employees and have journeyman status); *Dazey Corp.*, 77 N.L.R.B. 408, 411 (1948) (discussing that the petitioned-for tool and die workers are the highest paid employees and are required to serve a four and a half year apprenticeship).

One case that the union cited in its petition for a craft unit, *Mason & Hanger-Silas Mason Co., Inc.*, provides an impetus to turn to wall-to-wall units.<sup>169</sup> In deciding to allow the tool and die workers to unionize, the Board stated:

We further conclude that the pattern of separate representation by nine different unions of skilled employees, as well as two production and maintenance units, tends to show, as the Employer's labor relations manager concedes, that the establishment of a separate unit of tool and gauge department employees would not disrupt the stability of labor relations in this plant.<sup>170</sup>

Though many years ago now, the Board at the time was likely correct in its statement that one more union added to an existing multitude of unions and bargaining units is unlikely to make a difference in the *stability* of labor relations in the plant.<sup>171</sup> However, it fails to consider the business implications of running an organization with yet another union. The performing arts similarly face the problem of numerous unions under one roof as outlined above.

#### B. The Long-Term Business Implications of Microunits in The Performing Arts

While the day-to-day artistic and economic issues of microunits in the performing arts are clear, larger long-term implications also exist with numerous unions in the performing arts, such as ramifications of strikes and policy implementations. First, one fundamental aspect of labor law is unionized workers' right to refuse to cross a picket line.<sup>172</sup> Most CBAs in the performing arts have a no-strike provision, but they are not absolute.<sup>173</sup> These clauses typically do not require bargaining unit employees to refuse to cross another union's lawful picket line.<sup>174</sup> Because of the collective nature of union membership, most union employees, often with encouragement but not a demand from their union, will independently choose not to cross a lawful picket line.<sup>175</sup> Thus, having multiple unions, even represented by different labor

---

169. *Mason & Hanger-Silas Mason Co., Inc.*, 180 N.L.R.B. 467, 467–68 (1969) (discussing that tool and die workers could form a craft unit).

170. *Id.* at 468.

171. *See id.* (explaining that a separate unit of tool and gauge employees would not alter the stability of labor relations in the plant).

172. To legally cross a picket line, the picket line must be legal and not constitute a secondary boycott under § 8(b)(4) or an illegal recognition picket in violation of § 8(b)(7) of the National Labor Relations Act, 29 U.S.C. § 158(b).

173. *See, e.g., Kennedy Center Opera House Orchestra CBA 2018–21, supra* note 106 (stating that “[d]uring the term of this Agreement, the Union agrees not to engage in, support or participate in any sympathy strikes, or any work stoppage whatsoever, for any reason, including alleged unfair labor practices.”).

174. *See, e.g., Butterworth-Manning Ashmore Mortuary*, 270 N.L.R.B. 1014, 1015 (1984) (quoting the CBA at issue saying,

It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a primary labor dispute, or refuses to work behind any primary picket line, including the primary picket line of Unions [sic] party to this Agreement, and including primary picket lines at the Employer's place of business.

175. *See generally* Anna Baker, *Stand with Workers, Don't Cross the Picket Line*, THE COUGAR (Dec. 17, 2021), <http://thedailycougar.com/2021/12/17/stand-with-workers-and-dont-cross-the-picket-line/>



organizations, can lead to significant business disruption when a picket line forms or a strike occurs. However, even if non-striking employees would cross a picket line, many performing arts centers cannot continue with performances if certain unions strike. Without singers or dancers, operas and ballets cannot go on, even if the musicians and stagehands would be willing to work. Without stagehands at any performance, sets are incomplete and scene changes cannot occur, which is likely to prevent the opening of a production when replacements cannot be found.<sup>176</sup> In the Kennedy Center's recent IATSE negotiations, the union's local president even acknowledged this power by stating, "We are very confident most of the Kennedy Center's operations will be shut down if they let this go all the way."<sup>177</sup> But is the ability to shut down an entire institution with a strike a demonstration of a "community of interest sufficiently distinct from the interests of employees excluded?"<sup>178</sup> It seems not. When work is so intertwined that the employer cannot continue without a subset of employees, what more does the Board expect to see in defining functional integration? Yet, choosing to return to the *Specialty Healthcare* standard only exacerbates issues for industries that are fully integrated. If a wall-to-wall unit strikes, the employer knows it is in trouble. There is no cobbling together a solution,<sup>179</sup> but the outcome is far more predictable.

Additionally, with numerous unions at work in any performing arts venue, astute lawyers realize that negotiations with the most powerful unions need to occur on different cycles to spread costs and avoid shutdowns.<sup>180</sup> However, CBA terms vary, which means that new policies are likely to only be implemented during collective bargaining. Consider the issues with this during the #MeToo and #BlackLivesMatter movements. If an employer wants to implement a

---

(explaining the idea behind not crossing a picket line).

176. See Peggy McGlone, *Kennedy Center Stagehands Authorize Strike, Putting 'Hedestown' and Other Scheduled Shows in Jeopardy*, WASH. POST (Oct. 7, 2021), [https://www.washingtonpost.com/entertainment/kennedy-center-stagehands-strike/2021/10/07/f942bbf0-26e9-11ec-8d53-67cfb452aa60\\_story.html](https://www.washingtonpost.com/entertainment/kennedy-center-stagehands-strike/2021/10/07/f942bbf0-26e9-11ec-8d53-67cfb452aa60_story.html) [https://perma.cc/USR8-EVVT] (discussing a near strike at the Kennedy Center); Julia Jacobs, *Met Opera Strikes Deal with Stagehands over Pandemic Pay*, N.Y. TIMES (July 4, 2021), <https://www.nytimes.com/2021/07/04/arts/music/metropolitan-opera-local-one-deal.html> [https://perma.cc/BV86-KN8L] (discussing the avoidance of a strike at the Metropolitan Opera); Andrew R. Chow, *Why TV and Film Workers Just Authorized One of the Biggest Strikes in Hollywood History*, TIME (Oct. 4, 2021), <https://time.com/6103839/iatse-strike/> [https://perma.cc/5YU5-EZDA] (discussing the ramifications of a Hollywood strike).

177. McGlone, *supra* note 176.

178. PCC Structural Inc., 365 N.L.R.B. No. 160, slip op. at 11 (2017).

179. The idea that the "show must go on" leads to some creative solutions when problems arise. See, e.g., Judith Weinraub, *Opera House Orchestra Strikes*, WASH. POST (Sept. 2, 1993), <https://www.washingtonpost.com/archive/lifestyle/1993/09/02/opera-house-orchestra-strikes/52089bae-b055-4fa3-8fb2-e77254211f3c/> [https://perma.cc/3LUH-Z8KX] (discussing the possible use of a tape recording, a partial orchestra, or two pianos during an orchestra strike); Lawrence Van Gelder, *Singing Conductor Averts Opera Disaster*, N.Y. TIMES (Apr. 4, 2008), [https://www.nytimes.com/2008/04/04/arts/04arts-SINGINGCONDU\\_BRF.html](https://www.nytimes.com/2008/04/04/arts/04arts-SINGINGCONDU_BRF.html) [https://perma.cc/6ZCP-YVSF] (discussing an opera conductor who sang the tenor's role in *Aida* with a microphone from the orchestra pit when the tenor fell ill in Act IV).

180. See *supra* text accompanying note 130.

stronger sexual harassment policy, it likely needs to wait until the CBA is up for renegotiation.<sup>181</sup> If either the employer or the employees want to change a hiring policy to increase the number of diverse hires, that also likely needs to wait until the CBA is up for renegotiation.<sup>182</sup>

While a slow implementation process of new policies is frustrating, the potentially larger issue is that such policies could end up negotiated very differently across different unions. Because different unions have different constituents, each of these policies could turn out dramatically differently. What if one union is mostly male and does not see sexual harassment as an issue, while another union is mostly female and wants a guarantee that every employee has completed an eight-hour sexual harassment training? Collective bargaining requires an *agreement* to the terms or impasse. Thus, if one group decides to spend significant time challenging aspects of a new policy, an employer may decide to implement a policy in some units but not others, requiring years of collective bargaining. Additionally, some employees could end up with longer or shorter training, different training, or different payment scales for attending the same training. An employer could also implement a policy by reaching impasse and then unilaterally implementing the policy. However, the chances of coming to true impasse over a sexual harassment policy for unilateral implementation would be time consuming and seems improbable.<sup>183</sup> However, if a wall-to-wall unit exists, the implemented sexual harassment policy will at least apply equally to all employees.

While wall-to-wall units cannot solve all issues, a wall-to-wall unit has a better chance of consistent implementation of employer policies and agreements.<sup>184</sup> Employees recognize this, as the Philadelphia Museum Workers cited this as a reason for organizing as a wall-to-wall unit.<sup>185</sup> Both employers and employees benefit from consistent procedures and obtaining buy-in across constituents in every position, not just from the most powerful unions.

---

181. Some unions may agree to implement the policy and negotiate a temporary fix. Others may have demands about the type of training, payment for training, and length of training that ultimately leave the employer delaying the implementation until CBA negotiations so that there are other bargaining chips available. But the union does not owe it to the employer to bargain for a policy prior to the end of the CBA.

182. If both the employer and employees want to change the policy, they could agree to negotiate that term prior to the expiration of the CBA.

183. When good faith negotiations have been exhausted and both sides have reached an impasse, an employer is allowed to unilaterally implement the last proposal, though it is difficult to ultimately prove impasse. *Collective Bargaining Rights*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/employees/collective-bargaining-rights> [<https://perma.cc/48LD-2KXY>] (last visited Mar. 27, 2022).

184. While a universal sexual harassment policy may be successfully implemented more easily with a wall-to-wall unit, a stronger sexual harassment policy may be possible in certain units if each policy was individually negotiated. Alternatively, management and the unions may all agree to the same policy, even with different units.

185. Dafoe, *supra* note 122 and accompanying text.

## IV

IT IS UP TO LAWYERS AND UNION ORGANIZERS TO REFORM THE  
PERFORMING ARTS UNION STRUCTURE

Based on the history of microunit cases at the NLRB, the definition of a microunit will likely remain a partisan issue for years to come. This places the responsibility on lawyers and union organizers in the performing arts to guide their clients towards wall-to-wall units. Wall-to-wall units are a more sustainable option for new organizations,<sup>186</sup> new units at existing companies,<sup>187</sup> and employees prepared to decertify their current representation.<sup>188</sup> While some of these options are more difficult than others, wall-to-wall units offer a way forward to better serve the performing arts.

First, an appropriate union needs to exist. This can happen one of two ways: either a currently existing union could embrace wall-to-wall units of performing arts employees or a new union for the performing arts could form. In the case of a currently existing union, a union like IATSE, AFM, AGMA, or Equity would

186. New classical music organizations and venues still open regularly, many replacing organizations that shuttered due to financial difficulties and all with the potential to have union representation eventually. See Andrew Travers, *DanceAspen Elevates: Emerging Ballet Company Stages Two Nights of Performance and Premieres*, ASPEN TIMES (Mar. 3, 2022), <https://www.aspentimes.com/news/cover-hed-danceaspen-elevates/> [<https://perma.cc/N7XN-QKQF>] (replacing the Aspen Santa Fe ballet, which was dissolved during the COVID-19 pandemic); Molly Feser, *New Company “The Movement Ballet” Opens Inaugural Season*, WILLIAMSBURG YORKTOWN DAILY (Mar. 4, 2022), <https://wydaily.com/our-community/2022/03/04/new-company-the-movement-ballet-opens-inaugural-season/> [<https://perma.cc/Z899-RBYR>] (discussing the opening of a new ballet company); Michael Barnes, *A Jewel Box Called the Rosette Opens as a New Austin Performing Arts Venue*, AUSTIN AM. STATESMAN (Mar. 9, 2022), <https://www.austin360.com/story/entertainment/arts/2022/03/09/austin-classical-guitar-opens-rosette-performing-arts-venue/9404047002/> [<https://perma.cc/TE2R-294H>] (discussing the opening of a new performing arts venue). Some organizations also attempt to return from bankruptcy and negotiate new CBAs, though that is not fully discussed here. See Russell Platt, *Leap of Faith*, NEW YORKER (Jan. 15, 2016), <https://www.newyorker.com/magazine/2016/01/25/leap-of-faith-classical-music-russell-platt> [<https://perma.cc/Y2R4-2L6R>] (looking to bring New York City Opera back from bankruptcy).

187. When an arts organization forms, unions do not automatically enter the workplace. In fact, some workers may choose to seek out a union after an organization has been running for many years.

188. While rare, existing units may choose to decertify and join another union or end unionization. See Christina Mancuso, *Charleston Symphony Orchestra Musicians Vote to Leave Union*, BROADWAY WORLD (Oct. 30, 2013), <https://www.broadwayworld.com/bwwclassical/article/Charleston-Symphony-Orchestra-Musicians-Vote-to-Leave-Union-20131030> [<https://perma.cc/3AC2-W4NP>] (discussing the Charleston Symphony Orchestra’s musicians voting to leave the AFM); Special to the New York Times, *Seattle Symphony Players Vote to Change Unions*, N.Y. TIMES (May 2, 1988), <https://www.nytimes.com/1988/05/02/arts/seattle-symphony-players-vote-to-change-unions.html> [<https://perma.cc/C8EJ-HBQW>] (discussing the musicians of the Seattle Symphony decertifying their unit with the AFM to join the newly formed International Guild of Symphony, Opera, and Ballet Musicians). However, the employer cannot influence the vote, which would place full responsibility on the union to embrace a wall-to-wall unit and the employer to not fight the appropriateness of the unit. The employer can assist in advancing this process if it believes that the union is not supported by the majority of workers. See *Levitz Furniture Co. of the Pac. Inc.*, 333 N.L.R.B. 717, 725 (2001) (discussing the employer’s ability to withdraw recognition of a union). The employer needs only reasonable, good-faith doubt to obtain an election that is not otherwise barred, but it needs proof of an actual loss of majority support to withdraw recognition unilaterally. *Id.* In other words, lawyers on both sides need to be very careful to do this successfully.

need to step forward with a plan to represent all appropriate employees at a performing arts organization, like the American Federation of State, County, and Municipal Employees (AFSCME) representing non-profit workers in Philadelphia.<sup>189</sup> Because these unions already have a reputation, pension funds, and financial stability, this may be an appealing option. However, it may be difficult to get buy-in from current employees in these unions or to get employees in other unions to change unions. Alternatively, a new union for all performing arts employees could form. This could occur at the national level, operating like IATSE, AFM, AGMA, or Equity but with a different name and new mission. Or unions could form on a more regional level for performing arts organizations, like how Seattle musicians join one regional union, rather than a national union.<sup>190</sup> However, a new union would have no existing infrastructure and limited initial finances. A lack of existing infrastructure, while inconvenient, would allow for innovation, while a lack of financing might hinder options. This choice is left up to union leaders.

Second, because union organizers and union lawyers decide what type of unit to pursue during union organization, both groups must choose to pursue wall-to-wall units over smaller units when organizing a new group, or a newly decertified group, seeking a union. This will present a higher burden in some instances, but management could look for ways to incentivize a wall-to-wall unit, such as agreeing to voluntary recognition of the new union.<sup>191</sup> Alternatively, though unlikely, the NLRB could increase the required number of votes<sup>192</sup> to a supermajority for microunits, making a wall-to-wall unit more attractive to union organizers.

Third, management and management-side lawyers must limit their objections over breaking with industry precedent and instead focus on other lawful objections when unions are trying to organize, such as objecting to organizing supervisory employees.<sup>193</sup> Based on precedent, management-side lawyers who want to entirely avoid unionization at all costs could attempt to assert precedent, but this would completely halt any chance of changing from microunits and craft units to wall-to-wall units. While keeping a union as small as possible initially sounds appealing, if union organizers have enough interest for a wall-to-wall unit, they can find plenty of ways to organize many microunits.

Finally, employees must embrace and vote for a wall-to-wall unit over a smaller unit. Longtime union employees have a certain level of trust in their current representation. New representation will lead to different discussions, with some improvements and naturally some seemingly negative changes. For

---

189. See Dafoe, *supra* note 122 (discussing the Philadelphia museum workers' union); see generally AFSCME DC47, <https://dc47.org/> [<https://perma.cc/3JZT-ED6X>] (last visited Apr. 2, 2022).

190. *Seattle Symphony Players Vote to Change Unions*, *supra* note 188.

191. ESTREICHER & BODIE, *supra* note 36, at 103.

192. See *id.* at 104 (stating that currently a simple majority of votes is required to unionize).

193. See generally National Labor Relations Act, 29 U.S.C. § 152 (excluding supervisors from the protection of the NLRA and defining who is a supervisor under the NLRA); Oakwood Healthcare, Inc., 348 N.L.R.B. 686 (2006) (explaining the test to determine the supervisory status of an employee).

example, an employee who belonged to a union that enjoyed significant power over other unions in one organization may find that they have less bargaining power in a wall-to-wall unit. However, employees must focus on the *collective*, the whole purpose of collective bargaining, to recognize that this new structure helps the greater good. This structure helps employees in all areas of the organization to achieve a more equitable workplace, and it also ensures that arts organizations continue to exist and union members maintain their careers.

## V

### CONCLUSION

While the NLRB has taken up the issue of defining both microunits and craft units in *American Steel* and *Nissan*, these unit structures simply do not serve the performing arts industry anymore. Amid the COVID-19 pandemic, new arts organizations will sprout up and longstanding organizations could easily shut down. Thus, the time for change is now. Additionally, although the NLRB has made it even easier for unions to enter new and existing arts organizations by easing restrictions for microunits—and could do so for craft units in the coming months—the performing arts should take the lead from their visual arts counterparts and recognize the benefits of developing equity and inclusion policies, allocating resources for mission-driven activity, and embracing the flexibility that wall-to-wall units offer. Thus, the performing arts industry must break from its own precedent, following in the footsteps of the Philadelphia Museum workers, and consider an effort to form wall-to-wall units within the industry.