

Metropolitan Opera Association, Inc. and Operatic Artists of America, Petitioner. Case 2-RC-21699

February 26, 1999

ORDER DENYING REVIEW

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered the Petitioner's Request for Review of the Regional Director's Decision and Order¹ dismissing the instant petition to sever a unit of choristers (regular, steady extra, and extra choristers) from a broader unit that has been represented by the Intervenor, American Guild of Musical Artists (AFL-CIO) [AGMA] for over 30 years.² The Request for Review is denied as it raises no substantial issues warranting review. In denying review, we find that the Regional Director has set forth detailed and convincing reasons why the petition should be dismissed and that the Petitioner has failed to present "compelling reasons" for granting review.³

Contrary to our dissenting colleague's assertions, we agree with the Regional Director that it would not effectuate the policies of the Act to permit the Petitioner to carve out the choristers from the historically established bargaining unit. *Mallinckrodt Chemical Works*, 162 NLRB 387 (1967). While we recognize that the choristers have certain distinct functions and interests that are not common to all unit members, we agree with the Regional Director that the choristers do not constitute a distinct and homogenous group (or true craft unit) in the traditional sense and are not a functionally distinct department of the Employer.

The historical unit comprises all of the employees who appear onstage during performances (choristers, soloists, and dancers) and the employees who direct and choreograph their actions and performance (stage managers, stage directors, and choreographers). As the Regional Director found, the choristers share interests in common with other unit members based on their operatic skills and their indispensable role in the vocal aspects of an opera production. The Regional Director's findings make it clear that other members of the bargaining unit, particularly the performing members, also possess skills that are as "unique" to their particular responsibilities within the Employer's overall operations as do the choristers.

We agree with the Regional Director that AGMA and the Employer have maintained a stable and reasonably amicable bargaining relationship for over three decades, with ample accommodation for the choristers' particular interests. Negotiations for the extra choristers historically

have been handled by AGMA staff. Although the regular and steady extra choristers as a group have negotiated with the Employer, this chorus committee has done so only as an authorized arm of AGMA and not as a separate bargaining representative. Thus, AGMA has permitted the chorus committee to advance the choristers' special interests within the context of AGMA's responsibilities to represent the common interests of all unit employees. Similarly, as the Regional Director found, witnesses for the Employer and AGMA testified that the groups representing other artists or individuals (including the stage managers and stage directors) who also are covered by the collective-bargaining agreement with AGMA also have negotiated with the Employer as authorized arms of AGMA.

For these and other reasons discussed by the Regional Director, we agree with the Regional Director that the differences that exist in the functions, skills, and compensation of the choristers and those of other groups of employees in the existing unit do not constitute a compelling argument to disturb a 30-year history of continuous bargaining and successful representation of the choristers in the broader and functionally based unit. Accordingly, the Petitioner's request for review is denied, and the case is remanded to the Regional Director for further proceedings in accordance with his decision.

MEMBER HURTGEN, dissenting.

The Petitioner seeks to represent a unit of choristers (regular, steady extra, and extra choristers). These employees are now represented in a larger unit by the American Guild of Musical Artists (AGMA).¹ The Regional Director would not permit this severance, and he thus dismissed the petition. My colleagues deny review. I disagree.

The Petitioner has raised substantial issues concerning the Regional Director's decision not to sever the choristers from the historically established unit. As the Regional Director has found, the Petitioner is in a "unique position to fully and adequately represent the choristers' interest, and, if permitted to do so, could clearly effectively carry out that mission as a Section 2(5) labor organization." Nonetheless, he has concluded, as do my colleagues, that the unit should not be severed. I would grant review. I have set forth below some of my concerns. The listing is not intended to be exhaustive. Upon fuller review (which I would grant), other factors might well emerge as militating in favor of severance.

Since *Mallinckrodt Chemical Works*, 162 NLRB 387 (1967), determinations with respect to craft units have

¹ Pertinent portions of which are attached hereto as Appendix.

² In addition to the choristers, the unit includes solo singers; principal dancers and members of the corps de ballet including extra dancers; stage managers and assistant stage managers; stage directors, staff stage directors, and assistant stage directors; and choreographers.

³ Rules and Regulations, Sec. 102.67(c).

¹ AGMA, one of 19 unions that bargain collectively with the Metropolitan Opera, represents an existing unit that consists of: (1) solo singers; (2) stage directors, staff stage directors, and assistant stage directors; (3) stage managers and assistant stage managers; (4) choristers; (5) dancers (all members of the Metropolitan Opera's corps de ballet, including extra dancers); (6) principal dancers (engaged solely for solo dance roles); and (7) choreographers.

been made on a “case-by-case basis.” “In severance cases . . . we do not apply automatic rules but rather evaluate all relevant considerations.” *Kimberly Clark Corp.*, 197 NLRB 1172 (1972). In my view, it is not clear that the factors militating in favor of severance are outweighed by those that do not.

First, the choristers whom the Petitioner seeks to represent are a functionally distinct department of the Employer. For example, to a far greater degree than soloists, the choristers must concentrate on their ability to blend their voices with others in the opera company. The Petitioner argues that the work product of the chorus is unique in the sense that blending requires a “fine sense of ensemble,” obtained through years of appropriate training. In contrast, the voices of soloists are distinctive in company performances, and they are trained for those performances by personal voice instructors.

Second, the employees whom the Petitioner seeks to represent have retained their identity as a distinct group for purposes of collective bargaining. Since 1987, the Chorus Committee, an authorized arm of AGMA, has effectively served as the choristers’ representative in collective bargaining. The Chorus Committee has played a significant role in formulating initial bargaining proposals. It has regularly submitted its bargaining proposals early in negotiations, and has concluded agreements with the Metropolitan Opera well before contract expiration. Since 1977, the Committee has engaged outside counsel to represent it during negotiations. It has also resolved several grievances.

Because of this long-established pattern of bargaining, severance does not necessarily pose a threat to the stability of the parties’ bargaining relationship. Similarly, this is not a case where an additional unit would cause a breakup of one large unit. The units are already many and diverse, and an additional one would not necessarily be disruptive. In this regard, I note that the Metropolitan Opera already bargains with 19 different unions, negotiating 22 collective-bargaining agreements that cover 34 bargaining units, including the unit represented by AGMA.

Third, as the Regional Director recognized, members of the chorus have interests that are separate and distinct from others in the unit. They have separate immediate supervision. There are no seniority lists or bumping, bidding, or recall rights wider than the individual performance groups within the unit. Except in very rare circumstances, choristers do not perform the work of other employees represented by the AGMA, even as understudies. Moreover, soloists never perform the work of choristers. Further, according to the Petitioner, the choristers work hours are unparalleled by any other performing group, and they are the only performance group that performs together each night for the entire New York season. Moreover, they rehearse together, and to the exclusion of all other performance groups, for several

weeks in August before the opera season begins. They also do so for 3 to 4 hours each night for the entire New York season.

There are also differences in compensation and benefits between choristers, on the one hand, and other artists such as soloists, stage directors, and producers on the other hand. This is due in large measure to the fact that the other artists negotiate individual (personal) contracts with the Employer. These differences include differences in base wages, income tax withholding, and workmen’s compensation coverage. In some cases, the differences extend to other subjects, e.g., members of the corps de ballet, earn a lower percentage of overtime than the choristers. Also, regular dancers have shorter careers than choristers and are covered by an annuity, rather than a pension. They also receive a vacation. Choristers receive a pension, receive compensatory time off in lieu of paid holidays, and receive special compensation for, among other things, lifting heavy objects and making costume changes during rehearsals. In addition, regular choristers receive an annual vocal training allowance of \$900. There is no indication that any of the other performance groups earn this benefit. Moreover, the Metropolitan Opera treats choristers differently for payroll purposes. Regular choristers have a two-tier pay structure for rehearsals—one rate for a purely musical or “room” rehearsal (preseason without soloists or orchestra) and another for the later staging rehearsals. The regular chorus and steady extra choristers are the only employees covered by the AGMA-Metropolitan Opera collective-bargaining agreement who are paid “overscale.”²

The Regional Director notes that other opera companies include choristers in multicraft units. However, it appears that the Metropolitan Opera is significantly larger than other companies. In any event, the industry practice is not uniform. The Arizona Opera Company has negotiated a contract that covers only the chorus; a contract with the Toledo Opera Company does not include the chorus.

I find that the Petitioner has raised substantial issues as to whether, on balance, the *Mallinckrodt* factors weigh in favor of severing the chorus from the unit. I therefore would grant review.

APPENDIX

REGIONAL DIRECTOR’S DECISION AND ORDER

....

5. In its original petition, which the parties stipulated was timely filed, Petitioner sought to sever a unit of full-time and part-time choristers from an historic collective-bargaining unit

² Overscale is a mechanism designed to reduce the gap between the base rate of pay of these choristers and that of the higher-paid orchestra.

represented since the 1960's by Intervenor.³ Thus, Intervenor and the Metropolitan Opera have entered into a series of collective-bargaining agreements⁴ covering a unit of "Artists" defined as:

- (a) Solo singers
- (b) Stage directors, staff stage directors and assistant stage directors
- (c) Stage managers and assistant stage managers
- (d) Choristers (all members of the Metropolitan Opera's chorus, including extra choristers)
- (e) Dancers (all members of the Metropolitan Opera's corps de ballet; including extra dancers)
- (f) Principal dancers (engaged exclusively for solo dance roles)
- (g) Choreographers.⁵

Alternatively, Petitioner stated it will represent such other unit as the Board determines appropriate. At the close of the hearing, Petitioner amended its petition to include all regular choristers, steady extra choristers, and extra choristers employed by the Metropolitan Opera. Further, as yet another alternative, Petitioner said it will represent employees described in the collective-bargaining agreement between the Employer and Intervenor, excluding any independent contractors and supervisory personnel or any other unit the Board deems appropriate.⁶

Petitioner asserts that the unit sought is a distinct department principally composed of highly skilled Draftspersons having functions, skills, supervision, compensation, and benefits separate from those of other employees. Petitioner also asserts that there is a minimal degree of integration in the production process, that members of the chorus have not been adequately represented by Intervenor and that the stability of labor relations will not be unduly disrupted by severance because the Employer already bargains with several different Unions. Finally, Petitioner contends that while it is newly established, given its members' experience in negotiating contracts and handling grievances, it is fully qualified to represent the employees

³ AGMA intervened as the incumbent representative of the employees in the unit involved herein. Representatives from the Screen Actors Guild, Actors Equity Association and Local 802, American Federation of Musicians, herein Local 802, AFM, appeared at the hearing, but chose not to intervene.

⁴ The agreements have historically been divided into four sections, plus and appendix. Section one which sets forth general terms and conditions of employment is incorporated into the three other sections, which cover Principal Artists, choristers, and dancers. "Principal Artists" include soloists, stage and assistant stage directors, and stage and assistant stage managers. A "Plan Artist" is any "Principal" engaged on a weekly basis, who is offered and accepts employment as a "Plan Artist" and works the required number of weeks as provided for in the contract. A "Weekly Artist" is any "Principal" engaged on a weekly basis who is not a "Plan Artist" and works the required number of weeks as provided for in the contract. A "Weekly Artist" is any "Principal" engaged on a weekly basis who is not a "Plan Artist."

⁵ All of these "Artists" are also covered for the purposes of broadcast activities by a collective-bargaining agreement between the Employer and the American Federation of Television and Radio Artists (AFTRA). AFTRA was notified of the hearing and chose not to intervene.

⁶ Intervenor raised the question of whether the amended petition was supported by an adequate showing of interest, an issue, of course, not properly a subject of the hearing or this decision. As discussed below, it will be handled through an administrative investigation.

sought to be severed. The Employer did not take a position on whether severance should be granted.

Intervenor, on the contrary, opposes severance of the choristers and contends that the petition should be dismissed, among other reasons, because the work of the chorus is functionally integrated into the Employer's highly coordinated and collaborative production process. In addition, Intervenor contends it has adequately represented the choristers for several years and that severance would disrupt the stability in labor relations attained under the existing pattern of representation. Finally, it asserts that Petitioner is not a traditional representative of the type of employees sought to be represented herein.

The Metropolitan Opera which produces opera is one of the grandest, if not the preeminent opera company in the world. Substantially larger than most opera companies in the United States, Joseph Volpe,⁷ general manager of the Metropolitan Opera testified that it employs approximately 800 regular full-time employees and has a typical annual operating budget of \$137 million. Several individuals testified that the Metropolitan Opera, which performs between 22 and 27 operas a year, is unique because it is the only full-time opera company in the United States.⁸ Of the 24 operas presented during the 1995-1996 season, 5 were new productions. Raymond Hughes, the Chorus Master, testified that the amount of work the Metropolitan Opera does "is probably as much as all other opera companies put together." In a typical New York season, which lasts from September through April, the Metropolitan Opera gives approximately 30 weeks of performances in New York City. For three weeks during the summer, it also offers a series of free performances in New York City and metropolitan area parks. Although the Metropolitan Opera has a long history of domestic touring of fully-staged opera performances, it now primarily goes on international tours of 1 to 4 weeks, performing fully-staged and concert versions of operas. For example, in 1992 it toured in Spain, while in 1994 and 1996, it toured in Germany. In addition, the Metropolitan Opera also holds fundraising and gala performances like the one given in spring 1996 to celebrate the 25th anniversary of James Levine's debut with it.

Pamela Rasp, director of labor relations for the Metropolitan Opera since 1988,⁹ testified that the Metropolitan Opera

⁷ Volpe testified that he has a long association with the Metropolitan Opera. He became an apprentice carpenter in 1964. In 1969, he became the master carpenter on stage. He became the head of the carpenters' shop in 1972. In 1977, he became the technical director and a member of management. In 1981, he became assistant manager. As general manager, Volpe stated that he is responsible for all activities of the Metropolitan Opera, including negotiations. He reports to the managing directors of the board of the Metropolitan Opera.

⁸ According to Louise Gilmore, AGMA's national executive secretary since October 1993, the Metropolitan Opera is not the only full-time opera company. Although she testified that the Chicago Lyric Opera and the San Francisco Opera may be classified as full-time opera companies, she could not recall the number of weeks comprising their seasons. She further testified that choristers of the New York City Opera feel that their positions are readily becoming more classifiable as full-time. Former AGMA staffer, Allen Olsen did not agree with Gilmore that the San Francisco company was fulltime. Olsen could not name any full-time opera companies besides the Metropolitan Opera.

⁹ Rasp commenced employment with the Metropolitan Opera in 1979 as a member of the negotiating team. From approximately 1981 until 1985, she was assistant operations director. She then became director of personnel management. As director of labor relations, Rasp negotiates labor contracts, formulates bargaining proposals, attends

bargains with 19 different Unions, negotiating 22 collective-bargaining agreements, representing 34 bargaining units.¹⁰ Volpe, who started participating in negotiations in 1981, now serves as chief spokesman in cases where he deems it necessary. According to Volpe because the orchestra, chorus, and stagehands are the most organized and have the most leverage, he is directly involved in negotiations with those groups. Rasp and Robert Manno, chair of the chorus committee¹¹ each testified that a pattern has evolved over the years by which Local 802, AFM, which represents the orchestra, leads the negotiations. Manno explained that Local 802 is generally the first Union to settle, thereby setting the standard for the other Unions. Rasp testified that the Metropolitan Opera leads its AGMA negotiations with the chorus. Volpe and Manno stated that since 1980, the Metropolitan Opera had negotiated early agreements with the chorus and the orchestra. Volpe noted that agreements covering the other AGMA groups were generally late.¹² Rasp explained that since the 1980 lockout by the Metropolitan Opera, labor relations have been stable. Rasp stated that the Metropolitan Opera's "success in maintaining that labor stability since 1980 is attributable, at least in part, to [its] ability to establish, and within broad parameters, to stay within the framework of a pattern, and avoid leapfrogging."

When Volpe was asked about whether he believed certification of Petitioner as representative would undermine labor relations stability, he stated he saw no negative effect, assuming that Petitioner's leadership would be "some of the people on the [chorus] negotiating committee where we have developed this long-term relationship, and an understanding of how to achieve early negotiations, which in fact probably not very many people in the labor movement are capable of."

Gilmore testified that AGMA negotiates and administers approximately 50 to 60 contracts for 4000 to 5000 members employed in the fields of dance, opera, and choral music. According to Allen Olsen,¹³ AGMA maintains collective-bargaining agreements with a variety of performing arts institutions, including opera, ballet, and dance companies. Gilmore stated that AGMA had 25 to 30 contracts with opera companies. Olsen testified that in addition to the Metropolitan Opera, AGMA negotiated collective-bargaining agreements with the New York City Opera, the Chicago Lyric Opera, the Seattle Opera, the San Francisco Opera, the Los Angeles Music Center Opera, the Houston Opera, and the Pittsburgh Opera, to name just a few. Gilmore and Olsen both explained that AGMA is divided up into various geographic areas not only for administrative purposes, but also for the purpose of electing members to its board of governors, which number over 100.¹⁴ The general

grievance meetings and participates in mid-term bargaining. Rasp reports to Volpe.

¹⁰ All but two of the agreements have common expiration dates.

¹¹ Manno has been a regular chorister since 1977. He served as Chorus Committee Chair from 1977 until 1987 and has served as Chair again since April 1989.

¹² Section one of the AGMA-Metropolitan Opera contract is not subject to negotiation per se; its terms are the result of talks with individual groups covered by the contract.

¹³ Olsen, currently an insurance salesman with New York Life Insurance, worked for AGMA from 1967 until his termination in November 1993. Olsen commenced working for AGMA as Assistant to the National Executive Secretary and later became Associate National Executive Secretary.

¹⁴ According to Olsen, a large number of choristers were represented on the AGMA board of governors. Manno testified that during the

management, direction, and control of the affairs, funds, and properties of AGMA and the basic relations between members and employers is vested in the board of governors.¹⁵

Olsen testified that to his knowledge, through October 1993, AGMA generally covered more than one category of employees under a single collective-bargaining agreement with an opera company. Gilmore stated she was aware of only one opera company, the Arizona Opera Company, in which AGMA entered into a contract solely for the chorus. According to Gilmore, the Toledo Opera Company is the only unit represented by AGMA in the United States opera industry which excludes choristers.

Substantial testimony was presented regarding many of the employees in the current bargaining unit, with the exception of principal dancers. The Metropolitan Opera chorus is comprised of three groups: regular choristers, who work a 52-week year, steady extra choristers, who are guaranteed employment for the pre-season and New York season, and extra choristers, who augment the regular chorus and are engaged on a "per performance" basis as needed. The regular chorus is comprised of 78 members as provided for under the latest collective-bargaining agreement. During the 1995-1996 season, there were 2 steady extra choristers and approximately 70 extra choristers. Hughes explained that approximately 30 of the extra choristers were core members, i.e., carryovers from the year before. The number of extra choristers varies every year depending on the repertoire, i.e., the number of operas performed and the types of voices that are needed for specific operas. Extra choristers, who have performed in a certain opera one year, are considered first for employment when that opera is produced again. Volpe, Rasp, and John Hanriot, a chorus member for 22 years, all testified that for payroll purposes, the regular and extra choristers are considered separate departments within the Metropolitan Opera organization.¹⁶

A chorister, according to Hanriot, is defined as one who sings choral music in an ensemble. Thus, chorus members sing the same material at the same time, although different voices within the chorus may sing different notes and words from each

negotiations over the 1996-2001 memorandum of agreement covering the chorus, four members of the Chorus Committee, including himself, had been elected members of the AGMA board. According to Manno, only two of these individuals actively attended board meetings. Manno admitted that he had recently resigned from the AGMA board. In addition to the four Chorus Committee members who were elected to the AGMA board of governors, the parties stipulated that five regular chorus members had also been elected to the Board. Manno admitted that he had not only been on AGMA's board, but that he had also served as an elected officer of AGMA. According to Manno, when he communicated bargaining proposals to the Metropolitan Opera, the subject of whether or not he held a board of governors' position never came up. Furthermore, there was no discussion concerning whether or not AGMA was delegating him bargaining powers on its behalf because of his status as a board of governors' member, or his status as the Chorus Committee Chair.

¹⁵ According to Gilmore, generally the board only considers an agreement after it has been ratified by the unit and the area executive committee and also been approved by the work rules and contracts committee, as well as herself. Once the board approves an agreement, she signs it and it becomes binding.

¹⁶ The record does not reveal whether the extra choristers work on a sufficiently regular basis to be included in the unit. Thus, in the event the Board disagrees with the conclusion reached herein regarding severance, an eligibility formula will have to be established, by agreement or litigation, on who would be eligible to vote.

other. This, of course, is pursuant to the composer's written composition. Chorus members have typically studied music at a college or a conservatory and many have gone on to receive postgraduate degrees and start their careers as soloists. Generally, choristers continue to receive training throughout their careers, which can typically last from 20 to 30 years. Regular choristers rarely have occasion to work for other opera companies unlike other employees in the unit.

The chorus is under the supervision of Chorus Master Hughes,¹⁷ Susan Almasi, Assistant Chorus Master and Barbara Bystrom, Chorus Manager. According to Hughes, who reports to James Levine, the Metropolitan Opera's artistic director, he is responsible for everything that comes out of the choristers' mouths. Hughes testified that "one of [his] essential functions . . . [was] to bring [his] talents as Chorus Master and the talents of the chorus to the service of opera . . . as an entity, as a unified whole . . ." Neither Hughes nor Bystrom is responsible for disciplining chorus members. Hughes may recommend firing a regular, steady extra or extra chorister; however, his recommendations are usually taken and acted upon by Volpe only after consideration of all the relevant information.

Auditions to become a regular or extra chorister are held every spring. After auditions, interviews, and call backs. Chorus Master Hughes determines who should be offered a position and makes a recommendation to Volpe, who has final authority over the hiring. Hughes selects choristers on the basis of voice quality, the ability to blend with others and experience in a choral setting. Choristers must have a facility with multiple foreign languages. In addition to possessing basic musicianship, choristers must also have the ability to sight read music and memorize vast quantities of music and lyrics and the stamina to sustain an average performance of three hours. According to Hughes, what distinguishes a soloist from a chorister is "a fine sense of ensemble." Hughes added that "[u]ltimately the voice is key to the selection process, but the fact is that there [are] years of prior training that go to making someone qualified to become a chorister." Hughes observed, "Again the sense of ensemble that one can see almost—that one can hear very quickly in an audition situation, many—many people who are—many soloists at the Met, fine as they may be, famous as they may be if they audition for me, for the—I probably wouldn't let them sing eight bars because the—because the sound would not be one that would—that lends itself to blending in an ensemble—in a tight ensemble situation."

New choristers serve a 2-year probationary during which deficiencies pointed out by Hughes may be corrected. At the end of this 2-year period, new choristers may be served with a notice of nonreengagement. Unlike regular chorus members who have completed more than 2 years of service, these individuals have no recourse to the grievance and arbitration process, as long as the procedure for notification has been followed by the Metropolitan Opera. Average seniority for a regular chorus member is 15 years; turnover in the regular chorus is low.

During the 1995–1996 season, members of the regular chorus earned approximately \$110,000; which includes all overtime.¹⁸ Approximately three to five percent of a chorister's income is derived from radio and television broadcasts. The

base rate of pay for the regular chorus is unique. Rasp stated that a regular chorister is paid a weekly base salary for four performances in a week and receives additional pay for any other rehearsals and performances. Regular choristers have a two-tier payment structure for rehearsals—one rate for a purely musical or room rehearsal and another for a staging rehearsal. A steady extra chorister is guaranteed fewer weeks of employment and, therefore, earns less than a regular chorister. The regular chorus and the steady extra choristers are the only employees covered by the AGMA-Metropolitan Opera collective-bargaining agreement which are paid "overscale," a mechanism designed to reduce the gap between their base rate of pay and that of the higher paid orchestra.¹⁹ Both the regular chorus and the orchestra receive compensatory time off, herein CTO, in lieu of official paid holidays. Choristers also receive special compensation for covering, lifting heavy objects, wearing makeup, and making costume changes during rehearsals. In the past, when chorus members have covered for soloists in productions such as *Death in Venice*, rates of pay, and fees were negotiated outside the scope of the AGMA-Metropolitan Opera contract. Regular choristers are covered by a pension and are entitled to receive an annual vocal allowance fee of \$900 for training. Extra chorus members receive a smaller vocal allowance fee. The Metropolitan Opera withholds income and social security taxes from the choristers and covers them for New York State workers' compensation and unemployment insurance. The chorus has two large communal dressing rooms, one for men and another for women.

Preseason chorus rehearsals, which begin in August and last several weeks, are initially held in a small theater within the Metropolitan Opera facility under the direction of Chorus Master Hughes and his assistant. These rehearsals, which generally last 3 to 4 hours, consist primarily of musical preparation, during which choristers learn the music. Next, under a stage director's guidance, rehearsals are expanded to include staging. These rehearsals may last an entire day and may be held on the "C" level stage or the main stage. During these rehearsals, the soloists also participate. Hughes continues to make musical corrections to the choristers during these rehearsals. The next stage is for the chorus to rehearse on the main stage with the orchestra under the direction of the conductor. Finally, the chorus, soloists, ballet and orchestra rehearse together. At that point, the conductor is, of course, coordinating the various aspects of the artistic expression before him. Rehearsals on the main stage may last from 2 days to 2 weeks depending on whether the opera is a new production or a revival. Once the New York season commences, musical and staging rehearsals continue to be held. According to Rasp, choristers are given little latitude when they rehearse and perform they are not allowed to have artistic differences with Hughes. Hughes testified that he expects his performance suggestions to be "corrected very quickly."

Solo artists retained by the Metropolitan Opera are also members of the existing bargaining unit.²⁰ During the 1995–

¹⁷ Hughes has been Chorus Master since 1991.

¹⁸ Evidence was presented that members of the regular chorus pay AGMA \$78 a year in dues, plus 2-percent working dues on earnings up to \$100,000 in a year.

¹⁹ The gap between what a chorister and an orchestra player makes has narrowed considerably from 22.1 percent in 1983, to close to 10 percent in 1996.

²⁰ According to Rasp, soloists as opposed to choristers sing roles which are composed to be sung in isolation from other roles. Hanriot stated that while soloists must possess voice quality and have a facility with foreign languages, they do not always possess the basic musicianship common to choristers.

1996 season, 238 soloists were engaged on a “per performance” basis, 57 on a weekly basis and 10 worked full-time. Under the AGMA-Metropolitan Opera collective-bargaining agreement, all soloists are considered “Principals,” but only 10 fulltime soloists are considered “Plan Artists.” A soloist engaged on a “per performance” basis signs an individual AGMA standard form of employment contract. Some soloists are retained by the Metropolitan Opera as corporate artists. One reason for the large number of soloists is the fact that for every soloist, there is a “cover” or understudy. While some soloists negotiate for their services individually with the Metropolitan Opera, others are represented by agents.²¹ According to Rasp, the soloists engaged on a “per performance” basis are considered independent contractors by the Metropolitan Opera. Volpe further testified that “per performance” soloists are not employees of the Metropolitan Opera.²²

Soloists, like choristers and dancers, continue training throughout their careers and over a course of a season and a career soloists, like choristers, sing a significant number of operas. Several individuals testified that soloists, like stage directors and choreographers, work in other companies. Soloists are generally booked years in advance. Producers/stage directors often insist on certain artists because of their unique qualities of voice and appearance.

While no substantive testimony was presented regarding compensation of the soloists, the latest AGMA-Metropolitan Opera contract did set minimum rates of compensation for soloists and “per performance” soloists. No social security or Federal income taxes are withheld for domestic “per performance” soloists. Income tax is withheld from weekly and full-time soloists, as well as foreign “per performance” soloists, unless there is a tax treaty with the artist’s home country. Social security tax is also withheld from weekly and full-time soloists. Unlike full-time soloists, the Metropolitan Opera does not cover “per performance” soloists for New York State workers’ compensation and unemployment insurance. “Per performance” soloists are not eligible for health insurance coverage, overtime or vacation unlike the full-time soloists. Weekly soloists are also entitled to receive certain overtime payments. “Per performance” soloists are not covered by the pension plan like the full-time soloists; weekly solo artists qualify for a pension if they perform a required number of weeks. Weekly soloists who are engaged more than ten weeks in any season may elect to be covered by the Metropolitan Opera’s health insurance plan like the full-time soloists.

²¹ Soloist Erie Mills testified that either the Metropolitan Opera contacts her manager or her manager contacts the Metropolitan Opera to arrange roles, dates and fees.

²² The AGMA standard form of employment contract for “Principals” hired on a “per performance” basis states, “It is specifically agreed and understood that nothing contained in this agreement shall constitute [the Metropolitan Opera] Association the employer of Principal or Principal its employee.” While the individual contract used when “Principals” contract in the form of corporations contains that same disclaimer, the individual contract signed by “Principals” hired on a weekly basis does not. However, their contracts do not state that the “Artist” is an employee. Despite the language in the AGMA standard form of employment contract for “Principals” on a “per performance” basis, Mills testified that she believed that when she signed her contract with the Metropolitan Opera, she was entering into an employment relationship.

According to Rasp and Volpe, soloists are given a certain degree of latitude when they rehearse.²³ For example, Mills testified that soloists, unlike choristers, are allowed to “mark” during rehearsals leading up to the final dress rehearsal, whereby they just mouth the words and go through the stage direction. Soloists are also given more latitude than chorus members when it comes to their performances and artistic differences; some soloist suggestions are accepted, others are not.²⁴ However, soloists must participate in rehearsals and must perform within the guidelines specified.

Volpe explained that the Metropolitan Opera exercises control over the matter and means employed by soloists although, at times, such control is exercised with great difficulty. Volpe noted that in the five times the Metropolitan Opera has produced *Tosca* since 1990, it has had five different artists perform the role of the Baron, all of whom performed the role in a different manner and even wore different costumes. An example of the asserted independence of soloists was related by Volpe regarding a dress rehearsal of *Tosca*. A soloist decided that he was going to wear a powdered wig in one act, while in another act he would remove the wig and go bald. Volpe stated that he was displeased at this alteration of the production and spoke to the soloist who agreed to go back to the original design of the opera. When another soloist came in with his own costume and wig, the stage director told him that he could not do that. The soloist initially objected and indeed even wore his costume and wig on stage, but was eventually told to conform to the stage director’s instructions.

The Metropolitan Opera provides soloists with costumes, wigs, and shoes and they are told by the scheduling department when to report for fittings. While soloist Luciano Pavarotti wears his own shoes during performances, ordinarily the color and type of shoe is decided upon by the Employer. It is, of course, the director, not the soloist, who determines when costumes or shoes must be worn, when the rehearsals should begin and how much of the score should be sung at each rehearsal. There is evidence that soloist Pavarotti was permitted to alter the jail scene under the elevators when playing Mario in *Tosca*. The decision to concur in Pavarotti’s wishes, however, was the Employer’s and this degree of independence is not typical for a soloist.

Mills testified that about 6 months prior to the beginning of a season, the Metropolitan Opera will send her the “cuts” for the particular role she will perform. According to Mills, the Metropolitan Opera determines what she is to sing, including which “cuts” are to be made from the role. Before arriving for rehearsals at the Metropolitan Opera, she buys the music and memorizes the role in question. Her individual employment contract notes the day, if not the times, she must appear for rehearsals. About a month ahead of time, the Metropolitan Opera will notify her or her manager of specific rehearsal times.

When solo artists arrive for rehearsals, they may choose to rehearse with a member of the Metropolitan Opera’s musical staff. Mills stated that she is more likely to do what he or she asks for because he or she is more acquainted with the conductor’s desires. As part of the process of learning a role, Mills

²³ There is no difference between “per performance” and weekly soloists with respect to the levels of accommodation they are given and the supervision they receive.

²⁴ Concerning soloist Kathleen Battle, Stage Director Bruce Donnell testified that working with her was sometimes a “challenge” and he was surprised when she incorporated his suggestions.

hires private musical coaches to assist her with style and language skills. Thus, to prepare for the 1995–1996 season, she worked with private coaches for about 12 hours, paying approximately \$50 an hour. She was not reimbursed by the Metropolitan Opera for those coaching sessions. Under the latest contract, soloists, like the choristers, are given a vocal allowance of \$900. According to Mills, while she utilizes a coach as a “resource,” she retains the right to accept or reject a private coach’s recommendations, although in most cases, she will follow them.

Mills testified that rehearsals last 2 to 3 weeks depending on the difficulty of the opera. The initial rehearsals are held with only other soloists in a room with a piano on the “C” level. A rehearsal may be musical, staging or both, although usually the first day of rehearsal will concentrate on staging. The stage director or assistant stage director will show the soloists pictures of the scenery and, in many cases, there will be a mock up of the stage. In other cases, depending on the production, there may be tape on the floor. The stage director talks them through the blocking and then a piano is added. If it’s a musical rehearsal, soloists may go through their entire performance. According to Mills, the stage director will then usually critique their performance noting its positive and negative aspects. The director determines the staging, including when and where the performer is to deliver his or her lines.

Mills explained that after a period of time, depending on how intricate the opera is, the choristers are added. At some point during the first week, an orchestra rehearsal is held for both the soloists and the chorus. The second week of rehearsals are held on the main stage, with the actual scenery. Day by day, the chorus is added, then the ballet, then the orchestra, then costumes, makeup, and wigs. Throughout these later rehearsals, the director gives individual or group notes on a performance. After a final dress rehearsal is held, the production is ready to be presented to an audience. During performances, solo artists, unlike choristers, are given personal dressing rooms.

The corps de ballet, which is divided into regulars and extras, is also part of the existing unit. Rasp testified that a regular dancer provides rehearsal and performance services up to 25 hours in a week for a base salary of between \$45,000 and \$50,000. While dancers receive a fee for wearing makeup, they receive a lower percentage of overtime than the choristers. The Metropolitan Opera withholds income and social security taxes from the regular dancers and covers them for New York State workers’ compensation and unemployment insurance. Regular dancers, because of their shorter careers, are covered by an annuity, rather than a pension. They are entitled to vacation.

The corps de ballet is under the direct supervision of the ballet mistress, Diana Levy. The ballet rehearses daily in class or in full rehearsal, but their performing schedule is lighter than the chorus. The dancers have separate dressing rooms for men and women. Dancers, like soloists and choristers, continue training throughout their careers. Members of the ballet do not generally work for other opera companies.

Soloists, choristers, and dancers are made up by the same makeup department. They are also dressed by the same costume and wig departments. Generally when the company is on tour internationally, the dancers, choristers, soloists, and orchestra use the same means of transportation and stay at the same hotel. Mills testified that in 1988, she toured Japan with the Metropolitan Opera and that she traveled by airplane with the chorus. She also stayed in the same hotel as the choristers.

According to her, some soloists do not fly with the choristers, as in the case of Placido Domingo, who has his own private jet. Some soloists also choose not to stay at the same accommodations as the rest of the company.

The unit also includes producers, stage directors, and assistant stage directors. According to Volpe and Rasp, stage directors, some of whom are considered “producers” are brought in to create new productions for the Metropolitan Opera.²⁵ Stage directors are responsible for achieving his or her creative vision of an opera or that of some other stage director. They may also be hired to direct the first revival of that production to make sure that it is presented in the manner it was originally conceived. Stage directors who are considered “producers,” like soloists, are often booked 2 or 3 years in advance.

Those stage directors considered “producers” play a large role in the selection of the title artists.²⁶ An example of the Employer’s authority over casting issues was noted by Volpe who recalled approaching Franco Zeffirelli, a producer/stage director, about doing a production of *Carmen*. While Zeffirelli expressed interest in doing the production, he told Volpe that he did not like the soloist cast in the role of Carmen. Since the Metropolitan Opera had already signed a contract with the soloist, Volpe told Zeffirelli that he could not have the position. By the time Zeffirelli called Volpe back and told him that he had reconsidered, Volpe had hired another producer. However that producer later left, whereupon Zeffirelli agreed to direct the production with the cast already selected. Producers/stage directors, such as Zeffirelli, may decide, in connection with their concept of a production, who should sing what role. Producers/stage directors may choose to minimize the role of the ballet or change some of the people who would otherwise be singing scenes in the chorus. According to Volpe, a producer is hired to make such decisions. Producers/stage directors may extend rehearsals or schedule additional rehearsals, thereby requiring the Metropolitan Opera to pay overtime.

Those stage directors and producers do not work 52 weeks a year and are not eligible for vacation or overtime. Rather, they are hired on a “per performance” basis and are paid a negotiated fee for all their work, the minimum of which is set by the collective-bargaining agreement. Because of their stature, producers/stage directors such as Zeffirelli generally negotiate a salary well above the compensation floor set by the collective-bargaining agreement. “Per performance” stage directors and producers are not covered by the pension plan unless they opt for coverage in lieu of severance after working at least 10 performances in any given season. The Metropolitan Opera does not withhold income tax unless the stage director is a foreign artist. It also does not withhold social security tax or cover them for workers’ compensation or unemployment insurance. Like soloists, stage directors, and producers may choose to provide their services as a corporation or business entity. As with “per performance” soloists, the individual contracts signed by “per performance” stage directors and producers, disclaim employee status.

Staff stage directors, “Plan Artists” under the latest collective-bargaining agreement, are full-time employees who have

²⁵ According to Volpe, although called producers, the Metropolitan Opera is the real producer, and they are given the title as a matter of personal regard.

²⁶ During the 1995–1996 season, the Metropolitan Opera hired approximately eight “per performance” stage directors. The record is unclear who among them were considered “producers.”

achieved 6 years of seniority.²⁷ Staff stage directors are responsible for the complex operation of reviving a production, where the original stage director or producer is not present. They do so by following the production notes from the original production and do not have the same authority as those stage directors considered to be “producers,” although occasionally, they may remake a scene or an act.

It is the executive staff stage director, David Kneuss, who makes critical operational decisions and assigns stage direction staff to various productions, including decisions to hire and fire those employees. According to Rasp, in certain situations, a staff stage director may extend rehearsals or schedule additional rehearsals, thereby requiring the Metropolitan Opera to pay overtime. Typically, a staff stage director works with another staff stage director or an assistant stage director on a production. An assistant stage director can either be a full-time employee with less than 6 years of seniority or a free-lancer who works on a weekly basis for a certain number of weeks on one or more productions. Staff stage directors and assistant stage directors are all paid on a weekly basis and receive the rate of compensation set by the collective-bargaining agreement. Assistant stage directors are entitled to overtime, while staff stage directors are only entitled to overtime in certain circumstances. The Metropolitan Opera withholds income and social security taxes from the staff stage directors and assistant stage directors and covers them for New York State workers’ compensation and unemployment insurance. Staff stage directors and assistant stage managers are eligible for pension and medical benefits and vacation. Weekly stage directors and assistant stage directors may be eligible for these benefits if they work a certain number of weeks.

The existing unit also includes stage managers. Rasp testified that stage managers are responsible for the smooth flow of a rehearsal or performance on the stage. They insure that performers are present to go on the stage at the proper time, giving appropriate cues to the stagehands. When a chorister or dancer reports late for a rehearsal, the stage managers report it to the chorus manager and ballet mistress. According to Rasp, Hughes and Levy would then discuss the situation with her and they would decide what action should be taken. An assistant stage manager has similar, but fewer, responsibilities than a stage manager. Thomas Connell, as production stage manager, makes hiring and firing decisions of the stage management staff. Rasp explained that Connell has made suggestions to her about breaks and lunch periods for the chorus; however, Connell and stage production staff do not have the authority to change lunch periods or breaks. According to Rasp, the collective-bargaining agreement establishes a compensation floor for the stage managers. They are paid on a weekly basis and are entitled to overtime and vacation. The Metropolitan Opera withholds income and social security taxes from the stage managers and covers them for New York State workers’ compensation and unemployment and health insurance. They are also eligible for a pension. As of the hearing date, the Metropolitan Opera employed six individuals in the stage production management unit, all of which are “Plan Artists” under the most recent collective-bargaining agreement.

²⁷ According to the record, in addition to “per performance” producers and stage directors and staff stage directors, there are also freelance stage directors who work on a weekly basis.

Choreographers are also included in the existing unit. They are hired on a “per performance” basis and are paid a negotiated fee for all their work, the minimum of which is set by the collective-bargaining agreement. They usually negotiate a fee well above the floor. Like soloists and stage directors/producers, choreographers may work for other companies and may choose to provide their services as a corporation or business entity. According to Rasp, choreographers devise the dance steps used by a dancer in a given performance. Choreographers also work with stage directors on general movement. Hughes testified that this position differed from his in that while guest choreographers often train the ballet for certain operas, there is never a guest chorus master. Choreographers do not have the authority to change lunch periods or breaks. The Metropolitan Opera does not withhold income tax unless the choreographer is a foreign artist. It also does not withhold social security tax or cover these individuals for workers’ compensation or unemployment insurance. They are not entitled to receive overtime or vacation.

Rasp stated that the solo artists, chorus, and ballet take direction from the stage directors, staff stage directors, and assistant stage directors regarding their characterizations on stage. The solo artists, chorus, and ballet respond to the instructions, requests, and creative desires of the stage directing team made during rehearsals. The most recent collective-bargaining agreement provides that, “AGMA acknowledges that Stage Directors, Staff Stage Directors, Assistant Stage Directors, Stage Managers, Assistant Stage Managers and Choreographers are representatives of Association in the carrying out of their supervisory and executive duties (as distinguished from their artistic services) Association with respect to other ARTISTS.” Rasp and Volpe testified that they had no knowledge about the bargaining history associated with that clause.

Several individuals testified that the groups covered by the AGMA-Metropolitan Opera contract do not perform each other’s work. Regular choristers may audition for “solo” chorus roles such as that of the Page in *Rigoletto*. On a rare occasion, regular choristers may “cover” for, or understudy, soloists as in the recent productions of *Death in Venice*, *Samson*, and *Die Walkure*. Certain operas such as *Rigoletto* and *Meistersinger* call for members of the chorus to dance alone or with members of the corps de ballet. Although this atmospheric “dancing” is not choreographed, Hanriot testified that the two groups would rehearse together. There is no bidding or bumping between groups. There is also no opera-wide seniority list maintained and apparently no right to be recalled after a layoff.

Substantial history was presented regarding collective bargaining between AGMA and the Metropolitan Opera, with particular emphasis on the regular and steady extra choristers. Olsen testified that at the Metropolitan Opera, as elsewhere, AGMA involved its membership in negotiations to the greatest degree possible. Usually committees like the Chorus Committee at the Metropolitan Opera were formed. According to Olsen, it was AGMA’s policy to have substantial input from, and involvement of, those committees. Gilmore stated that generally she and AGMA staff would meet with them to discuss proposals and make recommendations. Regarding negotiations with the Metropolitan Opera, Olsen testified that a number of negotiations would be going on at the same time, in different locations. Gilmore testified that generally when AGMA bargains with the Metropolitan Opera regarding the chorus, proposals are prepared by its representatives, namely, the chair of

the Chorus Committee, the Chorus Committee members, and chorus delegates. Rasp testified since she has been with the Metropolitan Opera, management understands that when it deals and negotiates with the Chorus Committee that it is dealing with a committee authorized by AGMA.

According to Rasp, Metropolitan Opera representatives also deal with committees representing other artists covered by the AGMA-Metropolitan Opera collective-bargaining agreement. Those committees are authorized by AGMA as well. She explained that the word committee is an overstatement when it comes to the soloists, stage directors, and stage managers. In her experience, some agreements have been reached between herself and an AGMA official, with no employees present. Sometimes one person has been present representing those groups. In her experience, once memoranda of agreement have been prepared for the soloists, stage directors, and stage managers, they have not been presented to those groups for ratification like the chorus, but go straight to AGMA for signature. With respect to the ballet, Metropolitan Opera representatives generally meet with a committee, a memorandum is prepared and sent to AGMA for signature.

Manno testified that he did not know whether other members of the bargaining unit had committees similar to that of the chorus, although he did acknowledge that individuals do sit in on various bargaining sessions with the Metropolitan Opera. Rasp testified that when the Metropolitan Opera bargains with respect to other employees covered by the AGMA basic agreement, it usually receives separate proposals for each job classification. She stated that most committees do not have an attorney present when they bargain with the Metropolitan Opera.

According to Manno, a Chorus Committee has participated in negotiations with the Metropolitan Opera on behalf of the regular and steady extra choristers since at least 1977.²⁸ Fawayne Murphy, a regular chorus member for 27 years, testified that early in his tenure, the regular and steady extra choristers were already electing a committee to represent them in collective bargaining and contract administration.

In 1977, Hanriot, then Chorus Committee Chair, negotiated the chorus section of the 1977-1980 collective-bargaining agreement, along with outside counsel, who participated in the negotiations, and the Chorus Committee. The Chorus Committee requested funds to defray the cost of the outside counsels' legal retainer, but the Union refused to absorb this cost. Manno testified that the Chorus Committee held a series of meetings where it drafted proposals with the input of the regular and steady extra choristers. Olsen testified that the bargaining proposals for the 1977 negotiations were prepared by the Chorus Committee. Hanriot stated, "At that time, one of the main issues was 52 weeks of guaranteed employment. We also made a major change in the sick leave provision for regular and steady extra choristers, providing for a full year of sick leave for members with more than ten years tenure." The proposals were submitted to AGMA officials and Metropolitan Opera management.

During Murphy's employment as a regular chorister, he was elected Chorus Committee Chair for 1980-1983 and 1987-1990. As Committee Chair in 1980, he stated that he was responsible for drafting proposals and attending bargaining sessions with management. Murphy testified that at one time there

²⁸ Negotiations on behalf of the extra choristers have historically been handled by AGMA staff.

was a suggestion box, from which proposals were made up. Another time, a questionnaire was used to prioritize the issues of most importance. Once the proposals were in a presentable form, they would be presented first to the regular chorus for their approval. Murphy testified that the proposals were discussed with AGMA officials and that they were made aware of bargaining sessions. Murphy testified that an AGMA staff member attended maybe one session. At that time, the Chorus Committee retained Solomon Glushak, Esquire, as counsel. Glushak's services were paid for by the regular and steady extra choristers. Murphy believed that AGMA tacitly approved of Glushak's participation in negotiations because AGMA did not send a representative to the bargaining sessions. Olsen testified that he did attend one or two of the negotiations sessions leading up to the 1980-83 memorandum of agreement. He also explained that he was in regular contact with Glushak.

In September 1980, the Metropolitan Opera locked out its employees for approximately 12 to 14 weeks. According to Volpe, the key issue that led to the breakdown in negotiations was the four performance weekly limit demanded by Local 802, AFM. When the lockout started, the Chorus Committee had only begun to bargain; no agreement had been reached on any item. Murphy stated that while the main objective of the chorus was parity with the orchestra, it was really trying to stem the tide of disparity between the two groups. Manno testified that during the lockout, AGMA held three "shop-wide" meetings, which all covered "Artists" could attend.

Murphy testified that during the lockout, the Chorus spent time on the picket line. According to Murphy, AGMA came to the financial assistance of members of the chorus, including making mortgage payments. Murphy stated that he considered the assistance to be a loan, which he repaid. He did not know if other AGMA members repaid the financial assistance. The Chorus Committee met in members' apartments, hiring halls, and occasionally at AGMA's offices trying to work out strategies. Murphy was on the telephone with Glushak daily. The regular chorus was convened three or four times to keep them informed. A Federal mediator was brought in to act as a go-between [between] the Metropolitan Opera and the orchestra and chorus. The orchestra reached agreement on a contract first. A general "shop-wide" meeting was held. The chorus stated that it needed additional time to get its package together. About a week later, AGMA officials called Murphy and told him that the chorus had enough time and that it must reach an agreement. After the telephone call, the Chorus Committee was denied use of AGMA's offices because AGMA was holding a telephone campaign to produce a large turnout for the general ratification meeting.

Murphy testified that the Chorus Committee had marathon bargaining sessions in an attempt to hammer out the best agreement it could. The chorus voted to ratify the agreement. The entire shop voted to ratify an overall contract with the Metropolitan Opera. According to the record, it appears that the vote to return to work was "105 in favor, 8 opposed and 71 abstentions."²⁹

²⁹ In a letter to then AGMA National Executive Secretary Sanford Wolff dated March 28, 1991, Manno wrote, "It must be noted that in 1980 AGMA officials tried to dissuade the chorus from pressing forward its demands during the lockout. Had we not had our own attorney at the time, we would not have succeeded in achieving the four-performance weekend and the high increase in wages. During that time

In 1982, AGMA's board of governors adopted a resolution, stating that "no ratification vote on a collective bargaining agreement shall take place at the Metropolitan . . . Opera until such time as each AGMA segment, i.e., solo singers, stage personnel, chorus and ballet shall have ratified its section of the agreement by separate vote, and that no AGMA shop segment . . . shall vote on the agreement section of another shop segment." Gilmore testified that she was not familiar with this resolution.

No substantial testimony was presented regarding negotiations for the chorus section of the 1984–1987 collective-bargaining agreement, although Olsen was at the bargaining table for those negotiations.

According to Murphy, as Chorus Committee Chair in 1987–1990, he was responsible for organizing the committee, going through the procedures of formulating the negotiating proposals, and acting as chief spokesperson for the committee and acting as the liaison between management and the committee, as to setting up meeting dates. Olsen attended negotiation sessions. In his March 28, 1991 letter to Wolff, Manno wrote:

It is incorrect to assume that the fact that AGMA representatives were at the table for the negotiations of 1984 and 1987 means they should receive credit for the gains made. In fact, because of dissatisfaction with the AGMA Reps, it became necessary for the committee or members of the committee on more than one occasion to meet privately with management in order to reach an agreement to the satisfaction of the chorus. So as not to embarrass the AGMA representatives, the committee then had to schedule a meeting *with* AGMA negotiators present in order to "negotiate" the same terms and conditions already agreed to in their absence. This has also been raised in grievance matters. The implication here is that even management recognizes that we need better representation, or that we need to do a better job of representing ourselves.

A memorandum of agreement covering the regular and steady extra choristers for 1987–1990 was signed by Murphy, Olsen, and Volpe on December 4, 1986, well before expiration of the contract.

Manno testified that following the 1987–1990 negotiations, the regular and steady extra choristers adopted by-laws entitled, "Organizational Format and Election Procedures for the Metropolitan Opera Chorus" to codify how the chorus had and would operate. Under the bylaws, a women's and men's chorus delegate would be elected in the April of each year by their respective constituencies. According to Murphy, these two positions had existed as far back as 1969. The delegates serve as ex-officio members of the Chorus Committee, which is elected in the penultimate year of each collective-bargaining agreement. The committee would also be composed of a chair, three men choristers and three women choristers and a recording secretary. All of these positions had existed prior to 1987 with the exception of recording secretary. The committee would be responsible for handling labor negotiations, as well as any grievances not handled by the delegates. For example, Manno testified that in September 1993, the Chorus Committee intervened on behalf of a steady extra chorister, who wished to become a member of the regular chorus.

we were caught in a vice [sic] between our own union and management. We had to carry on two fights simultaneously, and it's remarkable that we came out as well as we did."

Sometime in 1990, the chorus started to discuss ways to have AGMA become more representative of its needs. Manno met with Wolff and Olsen to discuss its proposal to set up an escrow account for the chorus to help defray the cost of legal retainers and for other possibilities such as a supplemental retiree benefit. Manno then met with Wolff alone and discussed general concerns about the structure of AGMA and its lack of responsiveness. Manno also met with the board of governors, with members of the committee in attendance. He gave a presentation and answered questions. The board of governors never acted on the escrow proposal.³⁰

Manno testified that with respect to negotiations for the chorus section of the 1990–1993 collective-bargaining agreement, the Chorus Committee had a series of meetings where it drafted 21 proposals with the input of the regular and steady extra choristers. Olsen stated that at some point in 1990, he and Wolff were asked to meet with a delegation of chorus members, who requested that they be permitted to use John Hall, an AFTRA executive, to serve as its spokesperson and negotiate the chorus section of the collective-bargaining agreement. According to Olsen, the choristers' request was turned down. The Chorus Committee proceeded to negotiate alone by scheduling meetings with the Metropolitan Opera. Olsen stated that the Chorus Committee indicated that it would prefer to represent itself in negotiations and that the presence of Wolff or himself would prove detrimental to negotiations. Manno stated that he recalled one meeting, a courtesy call, where he went to the AGMA office and met with Olsen. According to Manno, he gave Olsen a copy of the proposals which were adopted by the Chorus Committee and authorized by chorus vote to be presented to the Metropolitan Opera. No changes were made to the proposals following the meeting with Olsen. Manno went on to attend bargaining sessions with the Metropolitan Opera's representatives, including Rasp, a total of nine times. Rasp stated that AGMA staff did not attend any of the bargaining sessions and that she never met with anyone from AGMA to discuss the memorandum of agreement. After the chorus unanimously ratified the agreement, Manno stated that he called Olsen and asked him to come to the Metropolitan Opera on November 19, 1989, to sign it. According to Manno, Olsen stated, "Well, this is the easiest negotiation I ever took part in." Olsen stated that he was in contact with Rasp at least several times a month in the course of events. Even though he was not present, Olsen felt as though Rasp kept him up to date on the progress of the negotiations between the Chorus Committee and the Metropolitan Opera.

By letter dated May 21, 1990, Manno wrote to Wolff and the board of governors to inform them that as of June 1, 1990, the chorus had retained Leonard Liebowitz, Esquire, for a 3-year period, to represent it in all aspects of its contractual and grievance dealings with the Metropolitan Opera. By a vote of 69 to 8, the chorus voted to assess each member a certain amount of money to cover Liebowitz' retainer. AGMA did not contribute to the cost of his retainer.

Manno testified that with respect to negotiations for the chorus section of the 1993–1996 collective-bargaining agreement, the Chorus Committee met after getting input from the regular and steady extra choristers either through a questionnaire or

³⁰ Manno testified that on November 25, 1991, a letter prepared by the Chorus Committee and its attorney was sent to various AGMA members around the country regarding the proposed escrow account.

meeting. Manno stated that Liebowitz attended all negotiation sessions between the Chorus Committee and the Metropolitan Opera. Rasp recalled that Liebowitz only attended one meeting in that round of negotiations. Manno stated that he recalled one meeting, a courtesy call as he called it, where he went to the AGMA office and met with Wolff and Olsen. According to Manno, he gave them copies of the proposals that were adopted by the Chorus Committee and authorized by vote to be presented to the Metropolitan Opera. No changes were made to the proposals following that meeting. Thereafter, Manno stated that there were about seven to nine negotiation sessions, none of which were attended by AGMA staff. Rasp stated that she believed that the Chorus Committee had the authority to negotiate an agreement. The Chorus Committee never said that it had to check with AGMA before making concessions or counter proposals. Rasp stated that she never asked the committee if it had to check because she believed it was authorized by AGMA to make concessions and counterproposals. On December 18, 1992, a memorandum of agreement was signed by Manno and Volpe and, thereafter, was ratified overwhelmingly by the regular and steady extra choristers. Although that agreement was set to become effective August 1, 1993, Gilmore stated that she only signed it in 1996, because the Metropolitan Opera, which insisted on printing the document, did not forward it to AGMA until then.

In December 1995, Manno testified that the Chorus Committee drafted proposals and negotiated a memorandum of agreement covering the regular and steady extra choristers from 1996 to 2001. Manno stated that he communicated the proposals to Gilmore. According to Rasp, the Chorus Committee, and not AGMA staff, contacted her about commencing bargaining for 1996 and beyond. Manno attended about nine bargaining sessions with Rasp and Volpe. AGMA staff did not attend any of these sessions. Gilmore stated that while she did not personally attend any bargaining sessions with the Metropolitan Opera covering the terms and conditions of employment for the regular and steady extra choristers through 2001, AGMA was represented at those sessions by members of the Chorus Committee. Rasp stated that she believed that the Chorus Committee had the authority to negotiate an agreement. Volpe stated that he never considered whether AGMA had authorized the Chorus Committee to bargain on its behalf. Volpe and Rasp both explained that no one from the committee ever said that they needed to check with AGMA before making a concession or bargaining proposal. Gilmore stated that she was aware that negotiations between the Metropolitan Opera and the Chorus Committee had resulted in a memorandum of agreement, which the chorus members had subsequently ratified 66 to 5. The memorandum of agreement was approved by the Metropolitan Opera's board of directors. Manno stated that Gilmore has never signed the agreement. Volpe stated that because it was his understanding that the Chorus Committee was authorized by AGMA to negotiate, he was shocked that AGMA did not sign the agreement.

Gilmore testified that she had certain reservations about the 1996–2001 memorandum of agreement, including contributions to the pension plan that might go into effect in 1998 or 1999. She explained that she believed that the chorus may have bargained away other benefits to get this contribution and that the memorandum of agreement did not give them the right to such a contribution, but simply the right to negotiate about it in the future. Rasp testified with respect to the pension contribution

provision, explaining that during the 1993–1996 negotiations, the Metropolitan Opera's pension consultants advised it that because of a ruling by the Financial Accounting Standards Board, (FASB), it would be better to avoid incurring pension liabilities during its negotiations. Rather, it should agree to negotiate pensions during the term of the agreement, without agreeing ahead of time to a specific increase. Gilmore attended a meeting in 1993, during which Rasp explained the FASB ruling and its effect on the Metropolitan Opera and the agreements it had negotiated with other groups of employees. According to Rasp, at the conclusion of a single bargaining session for "Principal Artists," Gilmore accepted all the Metropolitan Opera's terms, including the FASB pension clause.

Gilmore also objected to the term(s) of the agreement given that AGMA agreements are typically for 3 years. Rasp explained that the Metropolitan Opera's willingness to agree to a pension improvement in the 1996–2001 agreement was conditioned on extending the period covered by that agreement. Finally, Gilmore objected to the change contained in the agreement which reduced the guaranteed workweeks from 47 to 43. Testimony suggested that the change made no difference to choristers because they had gained 4 weeks of CTO in each year.

Rasp testified that she met with Gilmore, because "I simply wanted to raise with her the outstanding and unsigned agreement." Gilmore recalled that she did communicate her concerns to Rasp. Rasp testified that Gilmore did not define the areas of concern to her, "but alluded to difficulties that AGMA was facing and said that AGMA could not sign the agreement." Gilmore stated that she had been unable to share her concerns about the memorandum of agreement with regular and steady extra choristers. She asked many times to attend Chorus Committee meetings as well as bargaining sessions, but was told by Manno that she was not permitted to attend. She explained that because she had been virtually barred from meeting with the regular and steady extra choristers except for some meetings concerning the possibility of decertification, she had no idea whether the choristers understood what they had agreed to in the memorandum of agreement.

Volpe testified that on July 3, 1996, he received a faxed letter from Gilmore, which set out her specific concerns. He testified that he was surprised to receive such a letter given the amount of time which had passed, since negotiations between the Chorus Committee and the Metropolitan Opera were completed on December 18, 1995. While Gilmore had alluded to her concern about the agreement in a conversation with Rasp, no one from AGMA ever called the Metropolitan Opera to say there were concerns and what those concerns were.

According to Volpe, without the Chorus Committee's recommendation of the 1996–2001 memorandum of agreement to the regular and steady extra choristers, there would be no agreement. As the agreement was overwhelmingly approved by the regular and steady extra choristers, Volpe stated that the Metropolitan Opera has an agreement with the chorus that it is bound by and intends to implement. According to Manno, a memorandum of agreement between the Chorus Committee and the Metropolitan Opera Association produced a binding agreement, notwithstanding the absence of AGMA ratification. He explained that if AGMA did not ratify the 1996–2001 memorandum of agreement covering the chorus, the Metropolitan Opera would not be able to say, that in the absence of that ratification, there is no agreement.

AGMA and the Metropolitan Opera also entered into a number of side-letter agreements regarding events or situations not covered by the regular contract. Murphy testified that in 1986, the Metropolitan Opera planned to produce *Porgy and Bess*, but was required to maintain an all African-American cast because of a requirement of the composer's estate. In a side letter, the chorus waived any future objection to an all African-American chorus in *Porgy and Bess* in exchange for remuneration and the Metropolitan Opera's agreement that with the exception of *Porgy and Bess*, the chorus was the exclusive chorus for all its productions. There was testimony that officials of AGMA would have preferred to arbitrate the estate's requirement rather than enter into the side letter. However, it eventually concurred in the wishes of the chorus.

Side letters were negotiated by the Chorus Committee in 1992 and 1994 without input from representatives of AGMA. The letters were approved by the Chorus and signed. Apparently, the side letters were signed by AGMA without any discussions.

Prior to the Frankfurt tour in May 1996, a third side-letter agreement was negotiated by the Chorus Committee and Rasp. No one from AGMA participated in those negotiations either. The agreement dated February 7 was prepared by Rasp and subsequently ratified by the chorus members and the letter was forwarded to Gilmore for her signature. After reviewing it with Tom Jamerson, an AGMA staff member, they agreed that there were some issues that needed to be addressed and corrected. Jamerson forwarded revised side-letter agreements to Manno on April 1 and to Linda Mays, a Chorus Committee member, on April 4. Rasp agreed to revise the letter's language regarding the rehearsal overtime rate and indicated that she would be sending Gilmore a revised letter for her signature. Gilmore later proposed another revised side-letter agreement. According to Manno, AGMA sought to cover the ballet, although dancers were not going on the tour. AGMA also sought to eliminate the line for Manno's signature. The Chorus Committee caucused and unanimously agreed not to accept any of the changes proposed by AGMA. Gilmore stated that she signed the letter dated April 4, despite reservations; however, after speaking with members of the regular chorus, her fears were allayed. She also understood that the side-letter agreement was ratified by the members of the regular chorus, but not the version that she signed. Rasp stated that she did not receive a signed copy until after May 1.

In 1995, the Chorus Committee and the Metropolitan Opera signed a side-letter agreement which dealt with "overscale" for regular and steady extra choristers for the period covering August 1, 1997–July 31, 2001. Rasp explained that while the 1993–1996 collective-bargaining agreement had separate provisions dealing with weekly base salaries and "overscale" for the regular and steady extra choristers, the 1996–2001 agreement removed the "overscale" provision and had inserted a new provision to be called weekly compensation. Volpe stated that he no longer wanted an "overscale" provision in the collective-bargaining agreement. After a side-bar meeting between Volpe, Rasp, and Manno, Rasp drafted a letter dated December 15, 1995, which was subsequently signed by Manno and Volpe. This letter was not signed by AGMA. Rasp stated that during her tenure at the Metropolitan Opera, that this side letter was the first document setting forth a basic term and condition of employment for the regular and steady extra choristers that was not intended to be signed by AGMA. There were allegations at

the time that the side letter was intentionally withheld from AGMA, but those allegations were denied by the Employer.

Testimony was also presented regarding the grievance-arbitration procedures established by the AGMA-Metropolitan Opera contract. According to Manno, although the AGMA-Metropolitan Opera agreement provides that "any grievance shall promptly be submitted to a Grievance Committee, consisting of representatives designated by the Association and by AGMA," the provision has been in effect inoperable. He explained that as long as he had been employed by the Metropolitan Opera, the grievance committee, as outlined in the contracts, had never functioned. Rasp also testified that the grievance committee does not exist. According to Rasp and Manno, past grievances of the regular chorus have been handled by the Chorus Committee and/or the chorus delegates. Rasp stated that the Metropolitan Opera had never utilized the formal grievance procedure when handling the grievances of the members of the regular chorus.

Rasp gave numerous examples of grievances handled by the Metropolitan Opera and the Chorus Committee and/or chorus delegates. For example, in 1996, the Chorus Committee and the Metropolitan Opera, without AGMA, resolved the issue of a 7:30 p.m. curtain as it related to penalty payments to the chorus. In 1994, the issue of counting costume changes during rehearsals as actual time worked was resolved without talking to anyone on AGMA's staff. That same year, the Metropolitan Opera agreed to the Chorus Committee's demand that the choristers performing in *Death in Venice* be compensated above that amount contemplated by the collective-bargaining agreement. AGMA staff was never consulted in the matter. Also that year, the Metropolitan Opera addressed the Chorus Committee's concern regarding the schedule proposed for the weeks following the end of the 1994 New York season. The matter was never discussed with AGMA. In 1993, the delegates felt that the new production of *Meistersinger* had "heavy carries" to warrant a new set of payments beyond the applicable terms of the collective-bargaining agreement. The matter was resolved without AGMA. In 1992, the chorus delegates questioned the way seniority was assigned to new regular choristers who had previously been extra choristers. The Metropolitan Opera issued a clarification which satisfied the chorus delegates. AGMA was never contacted about this matter. Finally, Rasp recalled that in November 1988, when the choristers raised the issue of penalty payments to choristers performing in *Gottterdammerung*, it was resolved without contacting AGMA staff.

Rasp further testified that in the 1980's AGMA brought three arbitrations, two during her tenure with the Metropolitan Opera. One arbitration involved "Principal Artists," while the other two involved regular choristers. In one case, a terminated chorister was reinstated. In the second case, the Metropolitan Opera's decision to terminate a chorister was upheld.

Manno stated that chorus members believe that AGMA is "a drag on the ability of the chorus to pursue its own interests." According to Manno, members of the chorus believe that if it can bargain on its own with the Metropolitan Opera, that it will have greater leverage at the bargaining table than it has as part of AGMA. Manno explained that as was apparent in 1980, if the chorus was put in a position where it had to strike, or if it was locked out, it would have to fight AGMA before it fights management. The chorus "cannot even muster a strike vote currently because we know that we will be outvoted by the independent contractors in AGMA." Manno stated that in his

opinion, the chorus “had been acting like a union within a union for many years. For many years, many of us felt that AGMA has not been responsive to our needs. We have felt often that AGMA had acted almost like an adversary. We were fond of saying, not only do we have to fight the Met, we’ve got to fight our own union.” Hanriot testified, “I’m here involved in this hearing today, because I think that—because I want to see a union formed that will better serve the men and women who sing in the choruses of the Metropolitan Opera.”

As noted above, the Petitioner argues that the regular, steady extra, and extra choristers should be severed from the unit currently represented by Intervenor. The Petitioner asserts that the unit sought is a distinct department principally composed of highly-skilled craftspersons having functions, skills, supervision, compensation, and benefits separate from those of other employees. The Petitioner also asserts that there is a minimal degree of integration in the production process, that members of the chorus have not been adequately represented by Intervenor and that the stability of labor relations will not be unduly disrupted by severance because the Employer already bargains with several different Unions. Finally, the Petitioner contends that while it is newly established, given its members’ experience in negotiating contracts and handling grievances, it is fully qualified to represent the employees sought to be severed. Intervenor contends that the petition should be dismissed because the work of the chorus is functionally integrated into the Employer’s highly coordinated and collaborative production process. Intervenor asserts that it has adequately represented the choristers and severance would be disruptive of labor stability. It also contends that Petitioner is not a traditional representative of the type of employees sought to be represented here. As noted above, the Employer has taken no position on the severance issue.

The controlling precedent as the parties recognize is *Mallinckrodt Chemical Works, Uranium Division*, 162 NLRB 387 (1966), wherein the Board reconsidered the craft severance policy it promulgated in *American Potash & Chemical Corp.*, 107 NLRB 1418 (1954). Under *American Potash*, the Board established two basic tests for severance: (1) the employees involved must form a true craft or departmental group; and (2) the petitioning Union seeking to carve out a craft or departmental unit must be one which has traditionally represented that craft. *Id.* at 1422. Upon review, the Board concluded that the application of these “mechanistic” tests always led to the result that the interests of the craft employees always won out “without affording a voice in the decision to the other employees, whose unity of association is broken and whose collective strength is weakened by the success of the craft or departmental group, in pressing its own special interests.” *Mallinckrodt*, supra at 396. It furthered concluded that the policy of directing severance elections simply upon fulfilling the craft status and traditional representative standards failed to “permit satisfactory resolution of the issues posed in severance cases.” *Id.* The Board explained that by limiting consideration exclusively to the interests favoring severance while completely overlooking the equally important statutory policy of maintaining the stability of existing bargaining relationships, it was prevented “from discharging its statutory responsibility to make its unit determinations on the basis of all relevant factors, including those factors which weigh against severance.” *Id.* Thus, it concluded that all future severance determinations should be made after consideration of all the relevant factors with an aim toward balanc-

ing the interest of the Employer and the entire group of employees in maintaining the stability of labor relations and the benefits of an historical plantwide bargaining unit against the interest of a portion of that group in having the freedom of choice to break away from the historical unit. *Id.* at 392. Each case involves a judgment of what would best serve the worker in his/her effort “to bargain collectively with his employer, and what would best serve the interest of the country as a whole.” *Id.* (quoting *NLRB v. Pittsburgh Plate Glass Co.*, 270 F.2d 167,173 (4th Cir.1959), cert. denied 361 U.S. 943 (1960)).

The party seeking severance clearly bears a “heavy burden,” *Kaiser Foundation Hospitals*, 312 NLRB 933, 935 fn. 15 (1993), as it is very difficult to establish a craft unit under *Mallinckrodt. Vincent M. Ippolito, Inc.*, 313 NLRB 715, 718 (1994), enfd. as modified 54 F.3d 769 (3d Cir. 1995). As the Board explained, it “is reluctant, absent compelling circumstances, to disturb bargaining units established by mutual consent where there has been a long history of continuous bargaining, even in cases where the Board would not have found the unit to be appropriate if presented with the issue ab initio.” *Kaiser Foundation Hospitals*, supra at 936.

The Board in *Mallinckrodt* outlined several areas of inquiry which should be considered when determining the issue of craft severance. While not exhaustive, the following factors were deemed relevant: whether the proposed unit consists of a distinct and homogeneous group of skilled journeymen craftsmen or a functionally distinct department, working in trades or occupations for which a tradition of separate representation exists; the collective-bargaining history related to those employees, with an emphasis on whether the existing patterns of bargaining result in stable labor relations and whether that stability will be upset by the end of the existing patterns of representation; the extent to which the petitioned-for unit has established and maintained a separate identity during its inclusion in the overall unit, the degree of their participation or lack of participation in the creation and maintenance of the existing pattern of representation and the prior opportunities, if any, afforded them to obtain separate representation; the degree of integration of the Employer’s production processes, including the degree to which the operation of the production processes is dependent upon the performance of the assigned functions of the employees in the proposed unit; the qualifications of the Union seeking severance; and the pattern of collective bargaining in the industry. *Mallinckrodt*, supra, 162 NLRB at 397. The Board also considers whether the group of employees seeking severance is “similar to groups [it] heretofore has found entitled to severance from an overall unit.” *Id.* at 399.

I am aware of no severance case involving the type of skills of the employees in the unit involved herein. Therefore, it is relevant to consider the application of *Mallinckrodt* to the types of situations which have traditionally come before the Board before analyzing the central issue involved herein. It is notable that severance under *Mallinckrodt* has been granted sparingly by the Board. For example, in *Memphis Furniture Mfg. Co.*, 259 NLRB 401, 401–402 (1981), the Board, under the standards set forth in *Mallinckrodt*, granted severance to a group of over-the-road truck drivers from a production and maintenance unit. The drivers spent 95 percent of their time away from the plant had no contact with the production and maintenance employees and had separate supervision. While the petitioning Union had no history of representing drivers, the Board did not find that fact to be controlling since it was clearly a Section

2(5) labor organization formed for the express purpose of representing drivers in that case.

A unit of toolroom employees found to constitute an identifiable group of highly skilled workers was granted severance by the Board in *Eaton Yale & Towne, Inc.*, 191 NLRB 217, 218 (1971). Although the employees had been included in the overall production and maintenance unit for 13 years, the Board found that they maintained their separateness of identity and did not participate actively in the affairs of the incumbent Union or utilize the contractual grievance procedure.

In granting severance to a group of powerhouse employees from a production and maintenance unit in *Towmotor Corp.*, 187 NLRB 1027, 1028 (1971), the Board found that special circumstances were involved, including a relatively, short bargaining history on a comprehensive basis and the fact that separate representation of employees only recently added to the existing unit would not prove unduly disruptive. It noted that while including the powerhouse employees in the existing unit was lawful, it was accomplished without affording them an opportunity to express a choice as to the mode of representation. Furthermore, separate representation of powerhouse units was not unusual in the industry.

Bakers were accorded severance in *Safeway Stores*, 178 NLRB 412 (1969). The Board based its decision on the fact they were “an identifiable group of craft bakers who engaged in the skills of their trade and who performed functions that are different from and not integrated with those of the other in-store employees.” Id. at 413. It added that the bargaining history of their inclusion in the larger unit did not militate against severance, “particularly in view of the recent changes in the Employer’s method of baking and the changed job requirements.” Id. at 413–414. Severance was also appropriate based on the inclusive history and pattern of bargaining in the industry. Id. at 414.

Severance was granted to a group of 44 tool-and-die makers and machinists in *Mason & Hanger-Silas Mason Co.*, 180 NLRB 467 (1969). The Board concluded that the group constituted “a homogenous, identifiable traditional departmental group with a nucleus of craft tool-and-die makers and machinists who are engaged in the skills of their trade.” Id. at 468. The Board also found that the group retained their identity as a distinct group although included in the larger unit and that the pattern of representation of 6000 skilled employees by 10 different Unions tended to show that the establishment of a separate unit would not disrupt labor relations at the plant. Id. Moreover, the bargaining history of the production and maintenance unit was limited to a single 3-year agreement, which was preceded by a long period of separate representation.

In *Buddy L. Corp.*, 167 NLRB 808, 809–810 (1967), the toolroom employees were found to constitute an identifiable departmental group engaged in the tool-and-die making craft, who had retained their separate identity given that they had not participated in the incumbent Union’s internal affairs or in collective-bargaining negotiations for over a year and given that they dealt directly with management concerning grievances during that period rather than utilizing the contractual grievance process. In granting severance, the Board noted that although the toolroom representative submitted proposals to the incumbent Union’s bargaining committee concerning the rate of wage desired by the toolroom employees, these proposals were voted down by the Union’s representatives who based their demands on the interests of the production workers.

Finally, in *Jay Kay Metal Specialties Corp.*, 163 NLRB 719 (1967), a group of toolroom department employees were severed despite their inclusion in the broader unit. The Board found that these employees retained their separate identity as management bargained individually with each of them over wage rates and job classifications outside the framework of the collective-bargaining agreement in force. Id. at 721.

The Board’s reluctance to grant severance based on craft is reflected in numerous cases. For example, in *Kaiser Foundation Hospitals*, supra, 312 NLRB at 934, the Board reversed a Regional Director’s Decision and Direction of Election granting severance of 50 skilled maintenance employees from a unit of approximately 2800 nonprofessional employees. While the skilled maintenance employees would normally constitute a homogeneous craft or departmental unit, the Board noted that it has, “declined to sever a group of maintenance employees from an existing production and maintenance unit in the face of substantial bargaining history on a plantwide basis.” Id. at 935. The Employer and the incumbent Union had a collective-bargaining history of almost 40 years and there was no evidence that the incumbent Union had failed to adequately represent the employees. Id. The Board found that the petitioning Union was not particularly qualified to represent the craft unit sought, stating “Indeed the Petitioner has no experience representing employees of any kind as it was formed by 17 of the petitioned-for employees only three weeks before the petition was filed.” Id. at 936. Among other factors, the Board noted that the maintenance employees had been actively involved in representation matters and that the bargaining relationship, with the exception of two strikes, had been a stable one. Id.

In applying the *Mallinckrodt* factors, in *La-Z-Boy Chair Co.*, 235 NLRB 77 (1978), the Board noted the successful 20-year bargaining history, the high degree of functional integration, the degree of participation by the tool-and-die employees in contract negotiations, the overlapping supervision, and the lack of evidence that the petitioning Union was specially qualified to represent tool-and-die employees or that the incumbent Union had failed to represent them adequately. Id. at 78. Those factors were relied on by the Board in rejecting the petition to sever a group of tool-and-die employees from a unit of production and maintenance employees.

In *Bendix Corp.*, 227 NLRB 1534, 1537 (1977), the Board declined to sever a group of “platers” from the maintenance and production unit of an atomic weapons plant. While the Board acknowledged that the platers sought to maintain a separate identity during the 26-year period of inclusion in the broader unit, it found that they did not possess a community of interest sufficiently separate from that of the other production and maintenance employees to warrant severance. The Board noted that the platers’ work was closely integrated with the work of nonplaters and contributed to the production endeavor, and that common supervision, working conditions, and benefits also supported their inclusion in the broader unit. Moreover, while the petitioning union contended that the platers had been inadequately represented, the Board found that the platers had actively participated in the representation process as stewards and members of the incumbent Union’s grievance-and-negotiating committees.

The Board affirmed the dismissal of a petition seeking to sever a group of “skilled tradesmen” from a production and maintenance unit in *Firestone Tire & Rubber Co.* 223 NLRB 904, 906 (1976). Severance was denied based on the heteroge-

neous nature of the unit sought, the long bargaining history, and the high degree of integration of the production process. The Board noted that severance is not appropriate where the employees sought to be severed have participated significantly in the maintenance of the present representation pattern. In that case, 1 of 3 executive officers of the International Union was a skilled tradesman; 3 of the 11 local union presidents, who formed the Union's bargaining committee, were skilled tradesman; and skilled tradesmen held several other offices in the local Unions, in addition to past and present positions on the International Union's executive board. In response to the petitioning Union's contentions that the incumbent Union refused to accept or act on proposals made by the skilled employees and that the skilled employees, due to internal Union negotiations, received less than an "inequity" wage than was offered by the Employer, the Board held that a union that does not grant all the demands made upon it by the group of employees seeking to be severed cannot be accused of inadequately representing them on that fact alone. *Id.*

The Board in *Union Carbide Corp.*, 205 NLRB 794, 796 (1973), denied a petition seeking to sever a group of machinists and instrument makers from a larger unit. In denying severance, the Board noted that these employees shared a natural community of interests with other employees and that there was a 26-year history of stable bargaining relations. In response to the petitioning Union's contention that these employees had been inadequately represented in the larger unit because they were paid substantially less than other machinists working for employers in the area, the Board explained that even assuming that was true, that fact alone did not establish inadequate representation given that the employees had elected their own stewards; participated in many of incumbent Union's committees; made frequent use of the grievance procedures; had an opportunity to voice their concerns to the officers of the International and Local; and had their interests at the bargaining table represented by the incumbent Union.

In *Zia Co.*, 174 NLRB 972 (1969), the Board denied severance to a group of 11 machinists from a broader unit of 110 employees. Of the Employer's 950 employees, 750 were represented along craft lines in 12 different units by 11 different labor organizations. *Id.* The Board found that the skills used by the machinists were similar to the skills employed by the other employees in the unit, the Machine Shop was integrated into the operations of the Employer, and the incumbent Union had adequately represented the employees. *Id.* at 973-974. Indeed the representative of those employees had participated in the incumbent Union's affairs, including its negotiating committee. *Id.* The fact that the incumbent Union declined to adopt all of the demands of the petitioned-for unit was not considered proof of neglect by the Board.

After reviewing the numerous cases wherein the *Mallinckrodt* factors have been applied, as well as the facts in the instant case, it appears that some factors militate in favor of severance and others against it. Although the decision in my view is not free from doubt, after weighing all the relevant factors, I believe that severance of the regular, steady extra, and extra choristers from the existing collective-bargaining unit is not appropriate. My conclusion is predicated on the following considerations.

As noted above, to determine whether a petitioned-for group of employees constitutes a separate craft unit, the Board examines whether the petitioned-for employees participate in formal

training or an 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. *Schaus Roofing & Mechanical Contractors, Inc.*, 323 NLRB [781, 783 (1997)] (quoting *Burns & Roe Services Corp.*, 313 NLRB 1307, 1308 (1994)).

Despite overruling *American Potash*, the Board in *Mallinckrodt* stated,

We are not in disagreement with the emphasis the *American Potash* decision placed on the importance of limiting severance to true craft or traditional departmental groups, nor do we disagree with the admonitions contained in that decision as to the need for strict adherence to these requirements. Our dissatisfaction with the Board's existing policy in this area stems not only from the overriding importance given to a finding that a proposed unit is composed of such employees, but also to the loose definition of a true craft or traditional department which may be derived from decisions directing severance elections pursuant to the *American Potash* decision.

Mallinckrodt, supra, 162 NLRB at 397 fn. 14. The *American Potash* definition of "true craft unit," which was approved in *Mallinckrodt* states:

[A] true craft unit consists of a distinct and homogeneous group of skilled journeymen craftsmen, working as such, together with their apprentices and/or helpers. To be a "journeyman craftsmen" an individual must have a kind and degree of skill which is normally acquired only by undergoing a substantial period of apprenticeship or comparable training.

American Potash, supra, 107 NLRB at 1423.³¹ See also *Burns & Roe Services Corp.*, supra at 1308.

The record reveals that the Metropolitan Opera hires choristers with training and experience, whereby they have received a formal education in music or voice and have worked previously as either soloists or choristers with other opera companies. The record states that it is not unusual for choristers to continue training throughout their careers and they receive a vocal allowance fee from the Metropolitan Opera to do so. However, the record does not reveal whether they are required to continue training or how many of them actually do continue training. I also note that there is no evidence of any formal apprenticeship program although Rasp, the Metropolitan Opera's director of labor relations, and chorus member Hanriot testified that the first 2 years of a chorister's employment is tantamount to apprenticeship. Essentially however, the evidence presented describes a 2-year probationary period rather than an apprenticeship program during which time deficiencies in a chorister's performance can be corrected by Hughes, the chorus master. Compare *Mason & Hanger-Silas Mason Co.*, supra, 180 NLRB

³¹ In defining craft, the *American Potash Board* cited to the Census Bureau's definition of a craftsman, which is "one engaged in manual pursuit, usually not routine, for the pursuance of which a long period of training or an apprenticeship is usually necessary, and which in its pursuance calls for a high degree of judgment and of manual dexterity, one or both, and for ability to work with a minimum of supervision and to exercise responsibility for valuable product and equipment." *American Potash* supra, 107 NLRB at 1423 fn.7.

at 467, *Safeway Stores, Inc.*, supra, 178 NLRB at 413, and *American Potash*, supra, 107 NLRB at 1424, with *Boise Cascade Corp.*, 238 NLRB 1022 (1979).

It is recognized that the Board has held that lack of a formal training or apprentice program does not necessarily negate separate craft status, where the Employer requires that the employees have extensive experience and no other class of employees is required to have the same level of knowledge. *Burns & Roe Services*, supra, 313 NLRB at 1308. While the Metropolitan Opera does require choristers to have experience, the record reflects that other classes of employees, specifically the soloists, are required to have a similar degree of knowledge of opera and languages as the choristers.

While one can have a good performance by one soloist and a disappointing performance by another soloist as one chorus member testified, it cannot reasonably be disputed that the chorus is an integral and indispensable part of the operatic production. The fact that the soprano's greatness can be expressed despite the disappointing performance of the tenor, in my judgment, merely demonstrates the important role of the component parts, it does not negate their critical interdependence. The production process which results in an opera is a continuous process and the role of the chorus in the production process is part of the production flow. The activities of the chorus, the soloists, and the dancers must be coordinated. As one stated on the record, "The performance of opera, in its very essence, is the presentation, hopefully, successfully of the balance and blend of the various performing arts that are the component of the opera.

The duties of the petitioned-for choristers overlap with the duties of the excluded employees in very limited circumstances. It is recognized that the groups covered by the AGMA-Metropolitan Opera contract do not perform each other's work and that there is no bidding or bumping between them. However, the record also reveals that regular choristers may audition for "solo" chorus roles such as that of the Page in *Rigoletto*. On rare occasions, regular choristers may also "cover" for, or understudy, soloists as in recent productions of *Death in Venice*, *Samson*, and *Die Walkure*. Members of the chorus also dance alone or with members of the corps de ballet in operas such as *Rigoletto* and *Meistersinger*.

Moreover, while I note that the record reveals that the Metropolitan Opera assigns work according to job classification rather than need, see *Longcrier Co.*, 277 NLRB 570, 572 (1985) (utilizing employees according to need rather than by strict job classification), it also reveals that the petitioned-for choristers do share common interests with other members of the unit such as benefits, instruction, working facilities, and conditions.

While there is substantial testimony that the choristers are highly skilled and proficient, possessing many of the attributes traditionally associated with a craft, I am unable to conclude that these skills are unique to the chorus and not shared with other members of the bargaining unit. While the chorus by definition functions in an operatic production in a cohesive, distinctive manner. It is not their vocal skills which creates this homogeneity with their function in the opera. Thus, to the extent that choristers possess characteristics of a craft, it is not their role in the chorus which defines that craft since their excellence in operatic skills and abilities are attributes which are shared with other members of the opera. In my opinion, there-

fore, the chorus is not a "true craft unit" as that phrase has traditionally been applied.

The Board has also recognized that certain employees, though lacking the hallmark of craft skill, may also require that they be treated as severable units. Numerous employers have traditionally distinct departments comprised of employees identified with traditional trades or occupations and who have a certain interest in collective bargaining for that reason. The Board explained that the circumstances for such severance is "strictly limited in character and extent," and that this concept is not to be used "for fragmentizing plant-wide units into departments wherever craft severance cannot be established." *American Potash*, supra, 107 NLRB at 1423-1424. Because this concept does not provide a substitute basis for avoiding craft-unit criteria, the Board requires "strict proof that (1) the departmental group is functionally distinct and separate; and (2) the petitioner is a union which has traditionally devoted itself to nerving the special interest of the employees in question." *Id.* at 1424. On balance; I do not believe that the record supports a finding that the choristers are a functionally distinct department in any traditional sense. Although the record reveals that the Metropolitan Opera recognizes the regular and extra choristers as separate departments for payroll purposes, this fact is not dispositive on whether the choristers are a functionally distinct unit. More significant, in my opinion, is the fact that the chorus is an indispensable part of the vocal aspects of an opera production. While the record demonstrates that there is some cohesiveness and significant interests in common among the members of the chorus, its role as a "distinct functional unit" is less than clear.

Thus, while the chorus has negotiated many issues directly with the Employer, this is not necessarily inconsistent with the exclusive role of AGMA as the bargaining representative. Exclusive representatives may delegate to competent constituencies the authority to resolve particular issues. Here, where those resolutions threatened to conflict with the basic agreement, AGMA asserted its authority.

Certainly the chorus has demonstrated substantial considerations why its interests are diverse from others in the unit. However, diverse interests are not alone sufficient to carve out one group from an existing unit. Here, the overall common supervision, the critical integration of the chorus in the operatic production, the interchange of some choristers to soloist positions, albeit minor, all militate against the finding that the chorus may be appropriate as a "distinct functional unit."

It is recognized that there is substantial evidence that the Metropolitan Opera already bargains with 19 different Unions, negotiating 22 collective-bargaining agreements and representing 34 bargaining units. Indeed, Volpe, the Metropolitan Opera's general manager, testified that he was not concerned that severance of the choristers from the existing bargaining unit would result in labor instability. The Petitioner quite validly notes that in *Mason & Hanger-Silas Mason Co.*, supra, 180 NLRB at 467, the Board granted severance, because among other factors, the Employer representative testified, that since the Employer already dealt with numerous Unions, it would not be destabilized by dealing with one more.³² This factor clearly

³² However, unlike in *Mason & Hanger-Silas Mason Co.*, supra, Volpe's belief that severance will not result in labor instability, is premised not on how many Unions the Metropolitan Opera already deals with, but upon an assumption that the Petitioner's leadership would be comprised of "some of the people on the [chorus] negotiating commit-

militates in favor of severance since according to the Employer one more Union at the Metropolitan Opera would not undermine labor relations stability. It must also be noted, however, that the Metropolitan Opera and Intervenor have maintained a long and stable bargaining relationship of approximately 30 years with the exception of the 1980 lockout, a factor on which the Board also places significance. *Kaiser Foundation Hospitals*, supra, 312 NLRB at 936.

Testimony reveals that the Chorus Committee, throughout the years, has played a very significant role in formulating initial collective-bargaining proposals constituting all or part of the negotiating team dealing with the Metropolitan Opera and participating in the preservation and resolution of grievances on behalf of the regular and steady extra choristers. It has regularly submitted its bargaining proposals early and concluded agreements with the Metropolitan Opera well before contract expiration. Along with the Metropolitan Opera, it has also resolved several grievances over the years. This evidence, it may be argued, tends to establish a separateness of identity for collective-bargaining purposes of the choristers. However, it is also a plausible conclusion that the role of the Chorus Committee has been to function as the authorized arm of AGMA and not as an autonomous independent Union, a fact acknowledged by the Employer. In this regard it is noted that four members of the nine member Chorus Committee and five members of the 78-member regular chorus were members of AGMA's board of governors. Thus, unlike in *Buddy L*, supra, 167 NLRB at 809, where the toolroom employees ceased participating either in the incumbent Union's affairs or in collective-bargaining negotiations, here the chorus was represented on AGMA's board of governors and it had its own negotiating committee authorized by AGMA. Moreover, unlike in *Jay Kay Metal*, supra, 163 NLRB at 721, where management bargained individually with employees over wage rates and job classifications outside the framework of the collective-bargaining agreement in force, AGMA or its representative, the Chorus Committee, bargained with the Metropolitan Opera on behalf of the regular and steady extra choristers. Thus, the chorus, through the Chorus Committee, has consistently been allowed to discuss its special interests, as well as resolve its grievances, with the Metropolitan Opera. Indeed, it has "been afforded and [has] capitalized upon the opportunity to participate in Intervenor's affairs." *Lear-Siegler, Inc.*, 170 NLRB 766, 771 (1968).

The Petitioner offered other evidence to seek to establish that AGMA has inadequately represented the choristers. This testimony suggests that AGMA does not conclude agreements with the Metropolitan Opera in a timely manner. For example, it did not sign a side-letter agreement regarding an international tour until close to the tour's commencement. As of the hearing, it had not yet signed off on the 1996–2001 memorandum of agreement signed by the Chorus Committee and the Metropolitan Opera. On several occasions, the chorus asked AGMA to help it pay for legal assistance, which AGMA did not do. On another occasion, it asked if it could be represented by an AFTRA executive during negotiations, which AGMA rejected. Further testimony suggests that AGMA has not maintained the grievance-arbitration machinery since 1965 as provided for in the contracts and that a grievance committee was never estab-

tee where we have developed this long-term relationship." As Intervenor points out, there is no guarantee that the Petitioner's leadership would be members of the Chorus Committee.

lished. Further, the record reveals that while AGMA did go to arbitration over two choristers' grievances, it refused to pay for independent legal representation for them.

Based on the foregoing evidence, I am not persuaded that it establishes that the choristers' bargaining interests have been neglected or prejudiced by virtue of their inclusion in the overall unit sufficient to justify establishment of a separate unit. Thus, no testimony was presented that AGMA's delay in signing the side-letter agreement had any negative impact. While AGMA has delayed in signing the 1996–2001 memorandum of agreement, Gilmore, AGMA's national executive Secretary, explained that she had concerns about the agreement which she wanted to be addressed by the Employer and the Chorus Committee. While the Petitioner argues that these concerns were without merit, it is not unreasonable for AGMA, as collective-bargaining representative, to have its concerns addressed by the Chorus Committee and the Metropolitan Opera before it signs off on that, or any other agreement. While the Chorus Committee and the Metropolitan Opera resolved grievances over the years, based on the record, it does not appear that those grievances were brought to AGMA's attention or were inconsistent with the collective-bargaining agreement. Based on the record, it seems that the Chorus and the Metropolitan Opera chose not to use the contractual grievance procedure to resolve their disputes with the Metropolitan Opera. Unlike in *Buddy L*, supra, 167 NLRB at 809, where the toolroom employees commenced dealing directly with management concerning grievances instead of utilizing the contractual grievance process, here the Chorus Committee, authorized by AGMA, dealt directly with management. Finally, as AGMA is responsible for representing the choristers at arbitrations, its failure to provide private legal representation for the choristers cannot be considered evidence of not respecting the legitimate interests of the choristers.

The record does not disclose any attempts on the part of regular, steady extra and extra choristers to secure independent recognition prior to the instant petition. See *Zia Co*, supra, 174 NLRB at 974. I note that although AGMA had been the choristers' bargaining representative since the 1960s, it was not until 1990 that the chorus began to discuss ways to make AGMA more representative of its needs and that Manno met with Wolff to discuss general concerns about the structure of the AGMA and its lack of responsiveness. I also note that although its unhappiness with AGMA dates back to the early 1980s. The chorus did not seek independent recognition until 1996. Having functioned over the years within the framework authorized and maintained by AGMA, whereby the Chorus Committee acted as its representative, the chorus appears to have generally acquiesced, albeit reluctantly, in the established bargaining pattern, actively participated therein and received the benefits of that participation. *Goodyear Tire & Rubber Co.*, 165 NLRB 188, 190 (1967).

Finally, it is also noted that the record reveals that at the 25 to 30 American opera companies under contract with AGMA, choristers are included in the same type of multicraft unit historically covered by the AGMA-Metropolitan Opera contracts. On the other hand, there are some limited exceptions: a contract with the Arizona Opera Company, which covers only the chorus and a contract with the Toledo Opera Company, which does not include the chorus. There is conflicting testimony regarding whether any American opera company other than the Metropolitan Opera is a full-time operation. Other testimony reveals that it is AGMA's traditional practice at the Metropolitan Opera

and elsewhere to use committees to speak to the special interests of certain groups of employees in the bargaining unit. To the extent I find it is relevant, based on the record as a whole, the pattern of bargaining history in the industry generally militates against severance.

The Board has also considered whether the union seeking severance has traditionally represented the types of employees involved and its experience in doing so.³³ While the Petitioner itself is newly organized without any tradition of representing choristers on an independent basis, some of the Petitioner's members have gained considerable experience in negotiating and administering collective-bargaining agreements on behalf of the Chorus Committee and, indeed, may be uniquely qualified to represent choristers. Although the Petitioner does not currently represent any units composed exclusively of choristers or represent any employees under contract at this time, I do not find the Petitioner's lack of history in representing choristers to be controlling. This Petitioner is in a unique position to fully and adequately represent the choristers' interests and, if permitted to do so, could clearly effectively carry out that mission as a 2(5) labor organization. This factor, in my judgment, therefore does not militate against severance.

After weighing all the relevant factors, I must conclude that on balance that it would not effectuate the policies of the Act to permit The Petitioner to carve out the regular, steady extra, and extra choristers from the historically established bargaining unit. Central to this determination is that while the choristers are highly skilled and perhaps even the preeminent operatic chorus in the world, possessing many of the attributes traditionally associated with a craft, it is not these skills which define their unit. Since the chorus by definition performs as an ensemble, it is not their skill as vocalists which creates this homogeneity with their function within the opera. Thus, to the degree that the choristers do possess characteristics of a craft, as discussed above, it is not their role in the chorus which defines that craft since their excellence in operatic skills and abilities are attributes which are shared also with fellow members of the opera. Furthermore, I am reluctant to disturb the existing pattern of representation which has resulted in a long, existing collective-bargaining relationship of more than 30 years. Based on the foregoing and the entire record in the case, I conclude that the unit sought by The Petitioner is not appropriate under *Mallinckrodt* and, accordingly, severance is denied.³⁴

³³ "With respect to this factor, [the Board] shall no longer require, as a sine qua non for severance, that the petitioning union qualify as a 'traditional representative' in the *American Potash* sense. The fact that a union may or may not have devoted itself to representing the special interests or a particular craft or traditional departmental group of employees is a factor which will be considered in making our unit determinations in this area." *Mallinckrodt*, supra, 162 NLRB at 397 fn. 15.

³⁴ *Clohecy Collision, Inc.*, 176 NLRB 616 (1969), and *Utah Power & Light Co.*, 258 NLRB 1059 (1981), cited by the Petitioner are inapposite to the facts of the instant case as they both deal with the appropriate unit in which to hold a decertification election and not with severance by craft as in the instant case. Despite the general rule established in *Campbell Soup Co.*, 111 NLRB 234 (1955), that a bargaining unit in which a decertification election is held must be coextensive with the certified or recognized unit, the Board in *Clohecy Collision, Inc.*, allowed a decertification election in a single-plant unit, where the Employer with the Union's acquiescence, recognized, and contracted with single-plant units rather than the previously certified multiplant unit. Moreover, although the Board will not direct a decertification election among professional employees if they have previously voted for inclu-

While I have decided that severance of the chorus is not appropriate, the Petitioner alternatively seeks to represent the existing unit as set forth in the collective-bargaining agreement between the Employer and Intervenor. The alternate unit sought by the Petitioner raises issues regarding the independent contractor and supervisory status of certain classifications within that unit. Also significant is the voting eligibility of those employees within the alternate unit, as well as the petitioned-for unit, who work for the Metropolitan Opera on a periodic basis.³⁵ I am additionally aware that the decisions which I must reach as to the inclusion or exclusion of the various classifications involved in Petitioner's alternate unit, will have a major impact upon the rights of employees presently, and who for a significant period of time have been, included in the collective-bargaining unit, as well as the Employer and AGMA. It appears that in articulating an alternate unit, the Petitioner would include only a handful of soloists and dancers within the petitioned-for unit. Essentially the Petitioner argues that the bulk of the approximately 300 soloists, the record is unclear on the number, are independent contractors and that the classifications of producers, stage directors, stage managers, and choreographers are either independent contractors and/or supervisory employees and thus excluded from the unit. If Intervenor is correct that these classifications are properly included in the unit, the alternate unit sought by the Petitioner would increase from 150 to over 500. Prior to being able to proceed to hearing on its alternate unit, the Petitioner must be able to demonstrate that it has an adequate showing of interest in an arguably appropriate collective-bargaining unit. Thus, some greater specificity must be presented than exists in this record regarding the number of employees in each category, particularly with regard to whether employees have sufficient regularity of employment to be included in the voting unit.

After reviewing the entire record, I do not believe it is appropriate to resolve the independent contractor and supervisory issues because of the nature of the existing record. Although the developed record thus far, in my opinion, fails to establish that all soloists are independent contractors,³⁶ that finding by me would not be sufficient to make a judgment on the alternative unit request, since it is unclear how many soloists could be included in this unit and consequently the showing of interest necessary for further processing could not be determined. Further, the record is sparse as to the duties of the producers/directors and staff stage directors and, what, if any, differences exist between the classifications. Any possible differences between the full-time, weekly, and "per performance" soloists is similarly unclear and additional evidence is also required in these matters. The record also does not provide a basis for a decision on what the eligibility formula for inclusion

sion in an overall unit of professional and nonprofessional employees, *Westinghouse Electric Corp.*, 115 NLRB 530 (1956), it created an exception in *Utah Power & Light Co.* to allow decertification elections among a group of professionals who did not vote for inclusion in a mixed unit of professional and nonprofessional employees.

³⁵ See *Blockbuster Pavilion*, 314 NLRB 129 (1994), enfd. in part 82 F.3d 1074 (1996); *Trump Taj Mahal Associates*, 306 NLRB 294, 296 (1992); *Julliard School*, 208 NLRB 153 (1974); *American Zoetrope Productions, Inc.*, 207 NLRB 621 (1973); *Medion, Inc.*, 200 NLRB 1013 (1972).

³⁶ The fact that Pavarotti was allowed to alter a scene in *Tosca* hardly supports a finding that some 300 soloists are independent contractors.

of part-time employees would be or even what position the parties take with respect to such eligibility issues. While I am cognizant of the considerable time already expended by the parties and the importance of a final decision to them, should the Petitioner wish to proceed on its alternate unit, it must articulate with greater precision whom it would include and whom it would exclude from its alternative unit request, that it has a reasonable basis to succeed in establishing its alternative unit position and that it has an adequate showing of interest in this unit.³⁷ Accordingly, if further proceedings are required, the

³⁷ When the Petitioner, as in the instant case, broadens its original unit to one that is substantially larger and different from that originally petitioned for, the broadened unit is treated like a new petition and must be supported by an adequate showing of interest. *Centennial Development Co.*, 218 NLRB 1284, 1285 (1975). Further, as to the timeliness

matter will have to be remanded for a supplemental hearing for the development of a more complete record upon which to decide the issues discussed above.

Based on all of the foregoing and the entire record herein,

IT IS ORDERED that the severance requested in the petition filed is denied.³⁸ The matter is subject to further proceedings as set forth above.

of the showing of interest in the alternative unit, the parties are directed to the Board's Statements of Procedure, Sec. 101.17 and *Excel Corp.*, 313 NLRB 588 (1993).

³⁸ Under the provisions of Sec. 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by July 16, 1997.