United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1189 **September Term, 2019**
Filed On: March 10, 2020

COLORADO SYMPHONY ASSOCIATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, AFL-CIO/CLC,
INTERVENOR

Consolidated with 18-1194

On Petitions for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: SRINIVASAN, *Chief Judge*, TATEL, *Circuit Judge*, and EDWARDS, *Senior Circuit Judge*.

JUDGMENT

This appeal was considered on the record and on the briefs of the parties. *See* Fed. R. App. P. 34(a)(2); D.C. Cir. R. 34(j). The Court has accorded the issues full consideration and determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the reasons stated below, it is

ORDERED and ADJUDGED that the petition for review be **DENIED** and the National Labor Relations Board's cross-petition for enforcement be **GRANTED.**

The Colorado Symphony Association operates the Colorado Symphony, a full-time community orchestra. Its musicians are members of both the American Federation of Musicians, an international labor union, and the Denver Musicians Association, a local affiliate of the Federation. In 2010, the Symphony executed the Federation's Opera or Ballet Orchestra Integrated Media Agreement. The 2010 Agreement recognized the Federation as the exclusive collective bargaining representative of the Symphony's musicians. The Agreement addressed, among other things, the Symphony's production and release of national electronic media. The Agreement

expired on September 30, 2013.

This case stems from the parties' negotiations over a successor collective-bargaining agreement to govern national media opportunities. Over the course of the negotiations, the Federation filed numerous unfair labor practice charges against the Symphony with the National Labor Relations Board. An administrative law judge found that the Symphony violated the National Labor Relations Act ("NLRA"), and the National Labor Relations Board affirmed those findings.

The Board first held that the Federation was a valid collective-bargaining representative of the Symphony's musicians, such that the Symphony had a duty to bargain in good faith under section 8(a)(5) of the NLRA. Colorado Symphony Ass'n, 366 N.L.R.B. No. 122, slip op. at 30–31 (July 3, 2018). The Board then determined that the Symphony violated sections 8(a)(1) and (5) of the Act in the following five ways: (i) improperly withdrawing recognition of the Federation as the collective-bargaining representative for national media opportunities; (ii) failing to provide information requested by the Federation on various occasions; (iii) unilaterally implementing its opening proposal without first bargaining with the Federation to a good-faith impasse; (iv) recording various media projects for video games, studio albums, and films without complying with the 2010 Agreement or other Federation agreements; and (v) bypassing the Federation and engaging in direct negotiations with unit employees.

The Symphony now petitions for review of the Board's order, and the Board cross-petitions for enforcement of the order. We sustain the Board's factual findings and application of law to those facts if supported by substantial evidence in the record. *See* 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). We accept the Board's credibility determinations unless we find them to be "hopelessly incredible, self-contradictory, or patently unsupportable." *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (citation and internal quotation marks omitted).

The Symphony raises three principal arguments, none of which warrants relief. First, the Symphony argues that the Federation did not have majority support among the bargaining-unit employees when the 2010 Agreement was consummated. But the Symphony first raised that argument in July 2016, well past the NLRA's six-month statute of limitations for such a claim. *See* 29 U.S.C. § 160(b); *Raymond F. Kravis Center for Performing Arts, Inc. v. NLRB*, 550 F.3d 1183, 1189–90 (D.C. Cir. 2008). If the Symphony now seeks to challenge the Federation's status as a representative, the Symphony must make "an actual showing that the [Federation] no longer has majority support." *Id.* at 1189 n.1. The Symphony made no such showing here. Accordingly, we affirm the Board's conclusion that the Symphony had a duty to bargain in good faith with the Federation such that the Symphony's withdrawal of recognition of the Federation constituted a breach of that duty.

Second, the Symphony contends that the Board failed to consider the Federation's bad faith and did not balance the Symphony's conduct against the Federation's in concluding that the Symphony violated its duty to bargain in good faith. Specifically, the Symphony argues that the

Board failed to consider: (i) the Federation's failure to schedule in-person bargaining sessions over an eight-month period; (ii) the Federation's bad faith in using a bargaining session to gather information rather than make substantive proposals; and (iii) the Federation's subsequent refusal both to sign a confidentiality agreement pertaining to that information and to negotiate about the substance of the successor collective-bargaining agreement absent that information. The Board, though, did consider those arguments. It held that "[n]either side was acting in bad faith" when they struggled to schedule a time and place to meet, and that, to the extent that the initial bargaining "session went poorly," it was "because of [*the Symphony's*] unlawful refusal to provide information in response to the [Federation's] . . . information request," Colorado Symphony Ass'n, slip op. at 35 (emphasis added). The Board further concluded that, because "the [Federation's] need for information . . . outweigh[ed] the [Symphony's] confidentiality interests," the Symphony's "demand that the confidentiality agreement include a monetary damages clause was unreasonable." *Id.* at 32–33. Substantial evidence supports the Board's conclusions that the Symphony violated its duty to bargain in good faith by failing to provide information and by unilaterally implementing its proposal. *See Tenneco Automotive, Inc. v. NLRB*, 716 F.3d 640, 646–47 (D.C. Cir. 2013).

Lastly, the Symphony contends that the 2010 Agreement violated the Sherman Act. The Symphony, however, failed to raise that argument before the Board. An objection not first raised before the Board shall not be considered by the court, unless the failure or neglect to raise the objection is "excused because of extraordinary circumstances." 29 U.S.C. § 160(e). The Symphony contends that "extraordinary circumstances" exist here because the Board would have lacked jurisdiction to hear its Sherman Act claim. But, as the Board points out, it regularly addresses arguments based on statutes other than the NLRA, including the Sherman Act. *See e.g.*, *Teamsters Local Union No. 688*, 302 NLRB 312, 313–14 (1991) (considering respondent's defenses based in antitrust law); *Armored Transfer Serv.*, 287 NLRB 1244, 1251 (1988) (considering respondent's Sherman Act arguments). As a result, we find no extraordinary circumstances excusing the Symphony's failure to raise its Sherman Act argument before the Board.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(b).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk