



NLRB OVERRULES TRUMP-ERA PRECEDENT, RETURNING SECTION SEVEN RIGHTS TO EMPLOYEES WHO WORK ON PROPERTY NOT OWNED BY THEIR EMPLOYER

On December 16, 2022, the National Labor Relations Board issued its decision in *Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts*, Case No. 16-CA-193636. At issue in this case were the rights of Musicians of the San Antonio Symphony to distribute handbills on the property of the Tobin Center, which was not their direct employer. On remand from the D.C. Circuit, the Board returned to precedent set by *New York New York Hotel & Casino*, 356 NLRB 907 (2011), holding that the standard set by *Bexar County I* “essentially stripped off-duty contractor employees whose employer does not own the property where they work from having Section 7 rights at their workplace.” In a culture where the contracting of employees is increasingly common, the Board found it was more important than ever to protect the rights of *all* employees to engage in protected, concerted activity at their workplace.

When the case was first brought in 2016 (“*Bexar County I*”), the Trump appointed Board overruled previous precedent, holding that the *New York New York* standard did not sufficiently protect property owners. The Board then set forth a new test for when employers may exclude employees of contractors from their property when those employees seek to exercise their Section 7 right to engage in protected concerted activities: employees of contractors could be barred from engaging in Section 7 activity at their workplace by non-employer owners unless (1) they are “regularly and exclusively” employed on the property; and (2) they have no other reasonable non-trespassory alternative means to communicate their message. The Board applied this test, and found that, even though the musicians performed the majority of their work at the Tobin Center, because they sometimes performed elsewhere while working for their employer, they could not satisfy the “exclusivity” requirement of the test. The Board then found that the Tobin Center had not interfered with the musicians’ Section 7 rights by barring them from leafleting on the sidewalk outside the concert hall.

On appeal at the D.C. Circuit, the Court found the test established in *Bexar County I* to be arbitrary, in part because it granted more substantial rights to employees who exclusively work on a property for a single employer only a handful of days a year, such as a vending machine servicer, than to seasonal employees who work on a property on a regular but not consistent basis, such as a school teacher. The Court found this test arbitrary and too narrow, and remanded to the Board to redefine the boundaries of this test or create a new one. On remand, the Board, seeking a test which more fairly balances the rights of property owners and the rights of employees, overruled *Bexar County I* and returned to the *New York New York* standard, which provides that contractor employees have the right to engage in Section 7 activity at their place of work unless the property owner is able to demonstrate that the contractor employees’ Section 7 activity would significantly interfere with its use of the property or where the exclusion is justified by another legitimate business reason.

The Board applied the *New York New York* test to the symphony employees and found that the Tobin Center had violated the Act by prohibiting them from leafleting on their property. The Board found that the

leafleting planned by the symphony musicians would not have interfered with the Respondent's use of its property, and, to the contrary, was encouraging the Respondent's customers to "demand a better experience so that the Tobin Center and its resident companies would attract more patrons, be more successful, and provide more work opportunities for the Symphony employees." Unfortunately, this decision comes too late for the Symphony employees, whose employer, in June of 2022 and in the midst of a musicians' unfair labor practice strike, chose to dissolve the 83-year-old institution and file for bankruptcy.¹ Perhaps if the musicians' Section 7 rights had not been stifled in 2016, their message would have had its intended effect and its leadership would have changed course and preserved, rather than destroyed, an important cultural institution.

The return to the *New York New York* standard is an important reversal of Trump-era precedent. In a society where contract and temporary workers are more and more common, this decision will help ensure that all employees, regardless of their management structure, will have access to engage in protected, concerted activity for their mutual aid and protection in a meaningful and effective way. Employees' Section 7 rights are a meaningful tool to effect change, and the Board showed its support of this important set of rights by reversing *Bexar County I* and returning those rights to all employees.

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¹ <https://sanantonioreport.org/board-dissolves-san-antonio-symphony-will-file-for-bankruptcy/>