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Sisters' Camelot and Christopher Allison and IWW Sisters' Camelot Canvassers Union. Cases 18–CA–100514 and 18–CA–105462

September 25, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND MCFERRAN

On August 7, 2013, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The Respondent also filed cross-exceptions and a supporting brief.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions only to the extent consistent with this Decision and Order.

The Respondent is a nonprofit organization that collects and distributes unsalable food to low-income individuals in the Minneapolis-St. Paul area. The Respondent operates as a cooperative that is managed by a small

¹ The Respondent seeks reconsideration of the Board's June 17, 2013 Order denying its motion to dismiss the consolidated complaint. For the reasons stated in that Order, and because the Respondent has not shown extraordinary circumstances warranting reconsideration under Sec. 102.48(d)(1) of the Board's Rules and Regulations, we deny its request.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Board has jurisdiction over the Respondent, we agree that the Respondent engaged in interstate commerce by purchasing over \$5000 in automotive insurance from a local agent representing a corporation headquartered in another state. See *Civil Service Employees Association, Inc.*, 181 NLRB 766, 766 (1970); *Oregon Teamsters' Security Plan Office*, 119 NLRB 207, 208 (1957). The Respondent argues that it does not meet the Board's annual gross revenue threshold because a substantial part of the funds it collects are purportedly returned immediately to the canvassers as commission. We reject that argument. The record shows that the Respondent requires canvassers to turn over all collected donations at the end of each shift; only then are commissions paid. Cf. *Temptations*, 337 NLRB 376, 376 (2001) (tips and fees paid directly to employees by customers not properly part of the employer's gross business volume, because "the funds in question were never in the Respondent's possession, and thus the calculations were not 'readily obtainable'").

group of individuals known as the Collective. Membership in the Collective is open to those who fulfill certain participation requirements. Collective members make strategic decisions by unanimous consent.

The Respondent funds its operation primarily through donations obtained by its canvassers through door-to-door solicitations. During the relevant time period in this case, some of the canvassers formed the IWW Sisters' Camelot Canvassers Union (the Union), which was engaged in an organizing campaign among the canvassers.

The complaint alleged that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating canvasser Christopher Allison's employment because he engaged in union or other protected concerted activities. The complaint also alleged that the Respondent violated Section 8(a)(1) by suggesting to canvassers that union organizing would be futile, and by granting benefits during the organizing campaign in order to dissuade them from engaging in union or other protected concerted activities.

The judge dismissed the complaint based on his finding that the canvassers are independent contractors excluded from the coverage of the Act. However, he addressed the unfair labor practice allegations in the event that his conclusion that the canvassers are independent contractors is reversed on review. He found that the Respondent violated the Act by terminating Allison's employment and by suggesting that union organizing would be futile, but that it did not unlawfully grant benefits to the canvassers. As discussed below, we find, contrary to the judge, that the canvassers are employees. We further find, in agreement with the judge, that the Respondent violated the Act by discharging Allison and by its statement of futility, but we reverse the judge's dismissal of the grant of benefits allegation.

I. STATUS OF THE RESPONDENT'S CANVASSERS

As mentioned, canvassers solicit contributions to fund the Respondent's operating expenses. Canvassers elect whether to work on any given day and are not required to notify the Respondent of their plans. When they choose to work, they meet a canvass coordinator at the Respondent's facility at an established time for transport in the Respondent's van to the designated canvassing area for that shift. The canvass coordinator randomly distributes maps that designate each canvasser's assigned area. The canvassers solicit door-to-door within that designated area, keeping detailed records of what occurs at each house, such as whether anyone answered the door and the amount of any donation received. At the end of the shift, the canvassers gather at a designated location, deliver the collected donations and their records to the canvass coordinator, and are transported back to the facility.

There, each canvasser receives a commission based on the contributions the canvasser collected.

The judge found that the canvassers are independent contractors under the Board's multifactor common-law agency test, as set forth in *Roadway Package System Inc.*, 326 NLRB 842 (1998) (*Roadway III*), and *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998).³ We analyze this case under *FedEx Home Delivery*, 361 NLRB No. 55 (2014), a case that issued after the judge's decision, in which the Board restated and refined the analysis for evaluating whether individuals are employees or independent contractors. Specifically, we reaffirmed the longstanding principle, articulated by the Supreme Court in *United Insurance*,⁴ that, "in evaluating independent-contractor status 'in light of the pertinent common-law agency principles,' 'all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'" *FedEx*, supra, slip op. at 1 (quoting *United Insurance*, 390 U.S. at 258). We also confirmed, consistent with Supreme Court precedent, that our inquiry remains guided by the nonexhaustive common-law factors enumerated in the *Restatement (Second) of Agency*, Section 220 (1958). We additionally clarified that, in assessing a putative independent contractor's entrepreneurial opportunity for gain and loss, we will give weight to actual, not merely theoretical, entrepreneurial opportunity. Next, we refined the analytical framework to hold that, in assessing all of the relevant common-law factors, the applicable inquiry is whether the putative independent contractor is rendering services as part of an independent business. *Id.*, slip op. at 1. Finally, we affirmed the settled legal principle that the party asserting that an individual is an independent contractor bears the burden of establishing that status. *Id.*, slip op. at 12 and fn. 43. See, e.g., *BKN, Inc.*, 333 NLRB 143, 144 (2001).

Applying the *FedEx* formulation here, we find that the evidence fails to establish that the canvassers are independent contractors rather than employees.

(1) Extent of control by employer

The judge found that that this factor supports a finding of independent contractor status, emphasizing canvassers' freedom to work or not work as they choose and the lack of direct supervision while they are canvassing. We disagree. While canvassers are not required to report for

³ In making this finding, the judge particularly relied on the following: canvassers' ability to work or not work on any given day; their solely commission-based compensation, which depends on the time and effort that they expend on the Respondent's behalf; and their lack of supervision while canvassing.

⁴ *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968).

work on any given day, they are subject to significant control by the Respondent when they do work.⁵ The Respondent sets the daily start and end times for canvassing.⁶ If canvassers are not present at the Respondent's facility at the appointed start time, they are generally unable to canvass that day. During a shift, the Respondent requires canvassers to complete callback sheets that reflect in detail the houses visited, the outcome of each visit, and the donations collected. They are prohibited from soliciting for another organization during this time period. Canvassers do not choose the area in which they will canvass; the Respondent randomly distributes maps delineating the assigned areas each day.⁷ If canvassers are late in returning to the designated rendezvous point at the end of the shift, they may be subject to discipline. The Respondent has also disciplined canvassers on several occasions for other conduct, such as hostile behavior or unauthorized use of its property. This discipline has ranged from verbal reprimands to (in limited instances) terminations. The Board has found that even such occasional instances of discipline indicate significant control by an employer. See *Dial-A-Mattress Operating Corp.*, 326 NLRB at 889, 892–893 (employer's limited imposition of 1-day suspensions for various infractions supported finding of employee status). Based on this evidence, we find that this factor favors employee status.

(2) Whether individual is engaged in a distinct occupation or business

The judge found that the canvassers' ability to solicit on behalf of a different organization at any time when they are not actively soliciting for the Respondent supports independent-contractor status. We disagree. As we stated in *Lancaster Symphony Orchestra*, supra, slip op. at 5, the ability to work for multiple employers does not make an individual an independent contractor. Rather,

⁵ The judge found that this factor weighed in favor of independent contractor status, in part because of canvassers' purported complete discretion over whether to report to work on any given day. We find such discretion outweighed by the control that the Respondent otherwise exercises over the details of the work. See, e.g., *Lancaster Symphony Orchestra*, 357 NLRB No. 152, slip op. at 3–4 (2011) (discounting impact of musicians' ability to choose when and how often to work).

⁶ While on some days the Respondent stops canvassing at the time established by local ordinances, on other days it stops before the prescribed time.

⁷ We disagree with the judge that canvassers "have an opportunity to select an area in which to solicit" by seeking permission to return to previously canvassed areas using callback sheets. Most callbacks occur during regular shifts and must therefore take place near the regular daily canvassing area. Further, it appears that the canvass director makes the decision to assign the specific callback area to the requesting canvasser.

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the Board has recognized that “employees in certain industries . . . typically have intermittent working patterns, and [it] has accommodated that fact.” *Id.*

Unlike the judge, we find that this factor favors employee status. The key evidence here is that canvassers, through their presentations or “raps” to prospective donors, as well as the materials that they present and distribute, clearly identify themselves as working for the Respondent. See *Roadway III*, 326 NLRB at 851. As shown by the Respondent’s significant control over the canvassers and the importance of their fundraising activities to the Respondent’s operations, canvassers as a group are also well integrated into the Respondent’s organization.

We find that this factor favors employee status.

(3) Whether the work is usually done under the direction of the employer or by a specialist without supervision

The canvassers are not generally subject to in-person supervision while working their assigned routes. However, contrary to the judge, we find that this is not dispositive. First, the nature of the work makes such in-person supervision highly impractical. See *Mitchell Bros. Truck Lines*, 249 NLRB 476, 481 (1980) (analyzing extent of supervision in the context of “the nature of the occupation”). Second, and even more significant, the Respondent’s extensive recordkeeping requirements demonstrate that the Respondent closely monitors canvassers’ activities on a daily basis. As mentioned above, canvassers must record on their callback sheets what happens at each house that they visit. Canvassers must also note each house on their maps, as well as compile statistics showing how many solicitations they make and the amount of donations that they collect. The canvass director reviews all of this information at the end of each shift and receives the donations collected by the canvassers. If a canvasser’s records are inaccurate, incomplete or illegible, the Respondent requires him to correct or redo them. This significant level of oversight establishes that the canvassers ultimately do not work without supervision. See, e.g., *Michigan Eye Bank*, 265 NLRB 1377, 1379 (1982) (despite lack of daily supervision, employer effectively oversaw technicians’ work through weekly monitoring meetings). Thus, we find that this factor favors employee status.

(4) Skill required in the occupation

The Respondent does not require canvassers to have any specialized education or prior experience. It hires almost everyone who applies for a canvassing position. Before beginning work, canvassers must undergo training provided by a canvass director or similar representative of the Respondent. The training occurs during the

canvasser’s first shift with the Respondent. Its duration depends upon the canvasser’s prior experience and understanding of the material, with one employee testifying that his training lasted about 1½ hours and another reporting that his training spanned 15–20 minutes. The purpose of the training is to review the Respondent’s recordkeeping and presentation requirements and to discuss basic fundraising skills. Common topics include: the structure of the rap; the organization and use of canvassing materials; the end-of-shift procedure; and the Respondent’s mission. The canvass director or other representative also accompanies the new canvasser for a short time on his first shift, sometimes for only a few houses. Because canvassers need not have any special skills or prior experience and receive the minimal training necessary from the Respondent, we find, in agreement with the judge, that this factor favors employee status. See, e.g., *NLRB v. United Insurance*, 390 U.S. at 257–259; *Corporate Express Delivery Systems*, 332 NLRB 1522, 1522 (2000), *enfd.* 292 F.3d 777 (D.C. Cir. 2002).

(5) Whether the employer or individual supplies the instrumentalities, tools, and place of work

The Respondent chooses the territory where each day’s canvassing will take place and assigns each canvasser to his allotted canvassing area. The canvasser has little or no influence on his assignment and may not canvass outside his assigned area. The Respondent transports canvassers to the territory each day in its van. Canvassers need permission to transport themselves to the canvassing area and do so infrequently.

The Respondent also provides canvassers with canvassing materials. It procures the necessary permits and makes available copies of legal documents attesting to the Respondent’s legitimacy as a charitable organization for canvassers to show to potential donors, as well as visual aids discussing the Respondent’s mission. The Respondent also provides maps, callback sheets, informational fliers, donor receipt forms, and clipboards. The Respondent generally requires canvassers to return these materials at the end of each shift. The Respondent does not allow canvassers to create and use their own canvassing materials. Canvassers provide only their own pens.

We agree with the judge that this factor favors employee status. Significantly, the Respondent transports canvassers to the worksite, assigns individual canvassing areas, and provides canvassers with nearly all of the materials that they use.⁸

⁸ The Respondent argues that canvassers supply intangible tools by personalizing their raps, akin to the skilled comedians found to be independent contractors in *The Comedy Store*, 265 NLRB 1422 (1982).

(6) Length of time for which individual is employed

The Respondent generally allows canvassers to retain their positions indefinitely. Some canvassers work for the Respondent for multiple years; others do so for only a day. Individual canvassers commonly have gaps in their working relationships with the Respondent as they pursue other opportunities. While canvassers' discretion over whether and how much to work might support a finding of independent-contractor status, their potentially long-term working relationship with the Respondent weighs in favor of employee status. See, e.g., *Argix Direct, Inc.*, 343 NLRB 1017, 1021–1022 (2004). On balance, we find this factor to be inconclusive.

(7) Method of payment

The judge found that canvassers resemble independent contractors with regard to method of payment because their income depends upon how often and efficiently they work. However, the judge failed to discuss other critical aspects of canvassers' compensation. The Respondent generally pays canvassers a commission of 40 percent of the donations that they collect.⁹ This rate is nonnegotiable, which the Board has found supports a finding of employee status. See, e.g., *Lancaster Symphony Orchestra*, 357 NLRB No. 152, slip op. at 6. The Respondent also limits the canvassers' opportunity for greater earnings through additional work by assigning each individual canvasser a strictly-delineated area within which he may solicit each day. If a canvasser collects any donations outside of his assigned area, he must turn over the corresponding commissions to the canvasser(s) properly assigned to the area. While canvassers are not guaranteed any minimum compensation and do not receive benefits, we find that the critical consideration here is the Respondent's tight control over their compensation. Thus, we find that this factor weighs in favor of employee status. See, e.g., *FedEx*, supra, slip op. at 14 (employer right to curtail or configure service areas minimizes the possibility for meaningful economic gain); *Roadway III*, 326 NLRB at 852 (employer's suppression

However, the Respondent has provided only minimal evidence regarding how canvassers personalize the Respondent's basic rap and has failed to demonstrate that the raps, like the performances of the comedians in *The Comedy Store*, reflect a significant proprietary interest or creative investment on the part of the canvassers. Therefore, we reject the Respondent's argument.

⁹ Limited evidence suggests that if a canvasser individually collects more than \$500 in donations in a week, he may receive a 5 percent commission bonus for that week. There is no evidence showing how often canvassers receive such bonuses.

We note that to the extent that the canvassers are paid based on their production, they resemble pieceworkers, who are not excluded from employee status on this basis. See, e.g., *SAS Electrical Services*, 323 NLRB 1239, 1252 (1997).

of employees' opportunity for extra income supports finding of employee status).

(8) Whether the work is part of the regular business of the employer

The judge found that this factor favors independent contractor status because canvassers are not engaged in the primary function of the Respondent—distributing unsalable food to low-income individuals. We find this analysis fails to take into account the unique circumstances of the Respondent's operation. The Respondent derived revenues of \$271,705.82 in 2012. The record shows that canvassers were responsible for collecting \$244,878.17 (90 percent) of that total. Without the canvassers' work, the Respondent would be unable to obtain the operational funding to fulfill its mission. We therefore find, contrary to the judge, that canvassing is an integral and indispensable part of the Respondent's regular business and that this factor supports employee status.¹⁰

(9) Whether the parties believe they are creating an independent-contractor relationship

Some canvassers testified that they understood that they would be working as independent contractors. Several canvassers testified that upon starting work with the Respondent, they signed independent-contractor agreements prepared by the Respondent. However, because canvassers did not have the opportunity to bargain over the terms of the agreements, they provide "inconclusive evidence" (*FedEx*, supra, slip op. at 14) for finding that the canvassers are independent contractors.¹¹ At the end of each year, the Respondent issues each canvasser a 1099 tax form instead of a W-2 form. On these limited facts, we find that this factor tends to support a finding of independent-contractor status. See, e.g., *Dial-A-Mattress*, 326 NLRB at 891–892.

(10) Whether the principal is or is not in the business

The judge found that this factor supports a finding of independent contractor status because the Respondent does not have undisputed statutory employees who perform the same work as the canvassers, and the canvassers are not paid a wage, unlike another individual who the judge found "appears to be an employee." We find that other evidence outweighs the above considerations. As discussed above, canvassers collect a high percentage of all the money that supports the Respondent's programs. However, the Respondent also obtains donations directly from individuals and organizations—approximately 10

¹⁰ Member McFerran finds it unnecessary to pass on this factor because, even assuming that it favors independent contractor status, she still would find the canvassers to be employees based on the remaining factors.

¹¹ See *National Freight, Inc.*, 153 NLRB 1536, 1538 (1965).

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percent of its revenue in 2012. Further, while the Respondent's ultimate business purpose is the collection and distribution of free food to underserved communities, it is clear that it has established and directs its own fundraising operation, which relies primarily on the financial support collected by the canvassers.¹² Thus, contrary to the judge, we find that this factor supports a finding of employee status.

- (11) Whether the evidence shows the individual is rendering services as an independent business

In *FedEx*, the Board defined the scope of this factor as follows:

The independent-business factor encompasses considerations that the Board has examined in previous cases, including not only whether the putative contractor has a significant entrepreneurial opportunity . . . , but also whether the putative contractor: (a) has a realistic ability to work for other companies; (b) has proprietary or ownership interest in her work; and (c) has control over important business decisions, such as the scheduling of performance; the hiring, selection, and assignment of employees; the purchase and use of equipment; and the commitment of capital.

Supra, slip op. at 12 (footnotes omitted). As stated above, the Board gives weight to actual, not merely theoretical, entrepreneurial opportunity. *Id.*, slip op. at 1. It "assess[es] the specific work experience of those individuals" in performing the work at issue, including whether a substantial percentage of them have pursued other entrepreneurial opportunities. *Id.*, slip op. at 11. The Board also "evaluate[s] the constraints imposed by a company on the individual's ability to pursue this opportunity," including whether the employer unilaterally changes the individuals' terms and conditions of employment. *Id.*, slip op. at 12.

The judge's decision, which predated *FedEx*, did not consider the factor of whether the canvassers rendered services as part of an independent business. The judge's only reference to factors considered by the Board when evaluating entrepreneurial opportunity for gain or loss is his finding that "the fact that canvassers cannot subcontract [with others to perform some or all of their work] is irrelevant to this case," because "[v]irtually anybody who wants to canvass" can obtain the work directly from the Respondent. Applying this factor as set forth in *FedEx*, we find that canvassers do not render services as independent businesses.

¹² A member of the Collective acknowledged at the hearing that "the majority of the operating income that Sisters' Camelot requires to run is derived from the fundraising operation." As noted above, canvassers collected 90 percent of the Respondent's revenue in 2012.

Canvassers have no control over important business decisions. The record does not show that they have discretion to implement a business strategy for developing a customer base. They have no proprietary interest in the geographical areas to which they are assigned and they have no influence on the selection or assignment of territory. They make no monetary investment in connection with their work for the Respondent, and because they are prohibited from subcontracting these areas to others, they make no personnel decisions.

Canvassers cannot solicit donations for other organizations while they are actively working for the Respondent. This restriction limits their opportunity to develop other business relationships with new clients or employers as they canvass. Cf. *St. Joseph News-Press*, 345 NLRB 474, 479 (2005) (employer's lack of restriction on carriers' ability to deliver competing newspapers concurrently on their routes supported independent-contractor status). That the canvassers may and often do work for other employers when they are *not* actively working for the Respondent is essentially indicative of their part-time work schedule and has little bearing on whether canvassers are employees or independent contractors. See, e.g., *Lancaster Symphony Orchestra*, 357 NLRB No. 152, slip op. at 7. While canvassers may decide whether or not to show up for work, they must observe the start and end times set for each shift and if they fail to do so, they generally cannot work or may be disciplined. Based on all of the above considerations, we find that this factor weighs in favor of employee status.

CONCLUSION

The Respondent has the burden of establishing that the canvassers are independent contractors, and we find that it has not carried its burden. The factors that favor independent contractor status or that are inconclusive—length of employment and whether the parties believe they are creating an independent contractor relationship—do not outweigh the many factors supporting our finding that canvassers are statutory employees. Critically, when the canvassers work for the Respondent, they do so at times and locations determined by the Respondent. Their compensation is nonnegotiable and strictly limited by the Respondent's time and location restrictions. Canvassers must generally use the Respondent's tools and instrumentalities, including materials and transportation. They have no proprietary interest in any part of the canvassing operations, including their raps. They must keep accurate and detailed records as part of the Respondent's close scrutiny of their activities. If they do not comply with the Respondent's directives, they may be subject to discipline. Canvassers are also well integrated into the Respondent's organization and

identify themselves as part of it. The Respondent provides training, and canvassers need not have any specialized education or prior experience. While the Respondent conducts other fundraising activities beyond neighborhood canvassing, it could not fulfill its charitable mission without the canvassers, who procure most of its operating funds. Finally, there is no evidence showing that the canvassers render services as part of an independent business.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Having found that the canvassers are statutory employees, we agree with the judge, for the reasons he states, that the Respondent violated Section 8(a)(3) and (1) by terminating Christopher Allison's employment because he engaged in union activity.¹³ We also agree with the judge that the Respondent violated Section 8(a)(1) by informing employees that it would never accept a "boss/employee relationship" with the canvassers, a statement that the judge found indicated that union organizing would be futile because the Respondent would never bargain with the Union as their representative. However, for the reasons set forth below, we disagree with the judge's contingent recommendation to dismiss the allegation that the Respondent violated Section 8(a)(1) by granting benefits to canvassers in order to dissuade them from participating in union or other protected activities.

The facts relevant to this allegation are as follows. The Respondent first learned of the canvassers' union organizing efforts on February 25, 2013.¹⁴ That day, several canvassers attended the Collective's regularly scheduled public meeting. At one point, holding up their union membership cards, they read a statement informing the Collective that the canvassers had formed the Union and were demanding to begin negotiations on March 1. At no material time was the Union the canvassers' certified collective-bargaining representative.

On March 1, 12 of the canvassers and a union representative met privately with all 7 Collective members

and an independent mediator. Allison was 1 of 3 canvassers who read a list of the canvassers' 18 demands, which they also distributed to the Collective members. These demands requested various improvements in working conditions, including a system to allow canvassers to accept credit card donations; the right to elect two canvass coordinators; distribution of limited-use canvasser credit cards; and improved channels for canvass coordinators to pay canvassers directly. The canvassers then briefly left the meeting. While they were gone, a union representative informed the Collective that it could prevent a canvasser strike by agreeing to several of their demands. When the canvassers returned to the meeting, the Collective refused to make any of the requested changes. The canvassers then announced that they were on strike.

On March 4, at the Collective's next regularly scheduled public meeting, canvasser John Snortum read and distributed a prepared statement exhorting the Collective to bargain in good faith and stating that the strike would end at that time. Collective member Lisabeth Foster-Bayless then read a statement accusing the Union of "denying the legitimacy of alternative models of workplace democracy." The statement further declared that the Respondent respected canvassers' right to organize, but that it could not "accept any terms which force us into the role of bosses." The statement then announced that "as a good faith measure," the Collective would "mak[e] a substantial change" in policy by (1) offering immediate Collective membership to one canvasser chosen by the union members; and (2) lowering the participation requirements for other canvassers to become members of the Collective.

In an online newsletter posted on March 6, the Collective recited the Union's demands, asserting the Respondent's "genuine desire to arrive at consensus with their fellow workers" and "jumpstart the negotiation process by addressing some of these demands now." The Collective then stated that it would agree to four of the Union's demands: the requested system to allow canvassers to accept credit card donations; professional van maintenance; medical coverage for work-related injuries; and paid training for up to 3 days.¹⁵

The judge, with little discussion, recommended dismissal of the grant of benefits allegation on the basis that the benefits "were offered in direct response to requests from the Union and John Snortum's requests for such action." The General Counsel excepts, arguing that the Respondent granted "unprecedented and previously un-

¹³ We agree with the judge that the General Counsel clearly carried his initial burden to establish that Allison's union activity was a motivating factor in his termination. We also find that the judge correctly rejected the Respondent's rebuttal defense that Allison continued to be a "manipulative and disruptive presence" who had shown "no willingness to be accountable for his past actions or transform his future behavior." However, we disagree with the judge's finding that because it is clear that the Respondent terminated Allison for engaging in union activity, *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), does not apply here. The Board applies *Wright Line* in dual motivation cases such as this. The Respondent's failure to meet its rebuttal burden does not alter the analytical framework.

¹⁴ All of the following dates are in 2013.

¹⁵ The record is silent as to whether the Respondent actually implemented these changes.

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planned benefits” during the Union’s organizing campaign. He alleges that this action coerced employees by suggesting that unionization was inconsistent with the remediation of their complaints. In its answering brief, the Respondent argues that the judge correctly dismissed the allegation. It contends that the grant of benefits served the legitimate business purpose of avoiding a canvasser strike. It also maintains that the grant of benefits comported with its past practice of governing by consensus. As evidence of this past practice, the Respondent alleges that it implemented its Canvasser Code of Conduct in response to canvassers’ requests.

The lawfulness of an employer’s promise of benefits during a union organizational campaign depends upon the employer’s motive. See *Network Dynamics Cabling*, 351 NLRB 1423, 1424 (2007) (citing *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964)). Thus “[a]bsent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act.” *ManorCare Health Services-Easton*, 356 NLRB No. 39, slip op. at 21 (2010), enf. 661 F.3d 1139 (D.C. Cir. 2011) (citations omitted).

The record here provides a strong basis for inferring that the Respondent intended to thwart the employees’ organizing efforts by granting the benefits. The Respondent acted in direct response to the canvassers’ demands, which were the apparent impetus for their organizing efforts, and in tandem with its stated opposition to the Union. It also announced the new benefits around the same time that it unlawfully terminated Allison for engaging in union activity.

Further, the Respondent has not met its burden of showing a legitimate business justification for the grant of benefits. First, its desire to avoid a strike did not legitimize the grant of benefits. See *Overland Hauling, Inc.*, 194 NLRB 1146, 1149–1150 (1972) (finding benefits granted in response to strike unlawful because “[n]o business purpose is shown by Respondent other than keeping its business going as evenly as possible”). Second, the Respondent has failed to show a cognizable past practice of similar changes pursuant to employee requests. Regarding the Canvasser Code of Conduct, the record reflects that Collective members Aaron Barck and/or Bobby Becker initiated the creation of a policy. After the Collective approved the proposal, Barck and Becker merely provided the canvassers an opportunity for input about the policy’s content. Thus, unlike with the grant of benefits, the proposal for a Code of Conduct did not originate with the employees. Further, even assuming that the grant of benefits and the employees’ opportunity for input concerning the Code of Conduct de-

rived from the same managerial philosophy, one prior instance of taking employee desires into consideration does not establish a past practice.¹⁶ Thus, the Respondent has clearly failed to establish that its grant of benefits was motivated by legitimate business reasons and not the union organizing campaign. See, e.g., *Register Guard*, 344 NLRB 1142, 1142 (2005).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, the Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act.

(a) On March 4, 2013, the Respondent, through Collective member Lisabeth Foster-Bayless, informed employees that union organizing would be futile by stating that it would never accept a boss/employee relationship with the canvassers.

(b) On March 4 and 6, 2013, the Respondent granted benefits to canvassers in order to discourage them from participating in union or other protected concerted activities.

4. The Respondent committed an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act by terminating the employment of Christopher Allison on March 4, 2013 because he engaged in union activity.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(1) by (1) informing employees that union organizing would be futile because it would never accept a boss/employee relationship with the canvassers, and (2) granting benefits to employees in order to discourage them from participating in union or other protected activities, we shall order the Respondent to cease and desist from engaging in such conduct.

Having found that the Respondent violated Section 8(a)(3) and (1) by terminating Christopher Allison’s employment because he engaged in union and other protect-

¹⁶ See *Register-Guard*, 339 NLRB 353, 356 (2003). Establishing the existence of a past practice requires evidence that the practice occurred “with such regularity and frequency that employees could reasonably expect the ‘practice’ to continue or reoccur on a regular and consistent basis.” *Caterpillar, Inc.*, 355 NLRB 521, 522 (2010) (citing *Sunoco, Inc.*, 349 NLRB 240, 244 (2007)).

ed concerted activities, we shall order the Respondent to offer Allison immediate reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed. We shall also order the Respondent to make Allison whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In addition, the Respondent shall compensate Allison for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). The Respondent shall also be required to expunge from its files any and all references to the discharge, and to notify Allison in writing that this has been done and that the termination will not be used against him in any way.

The Respondent argues that even if it unlawfully terminated Allison's employment, his alleged failure to comply with its subpoena duces tecum precludes a remedy. The subpoena, in relevant part, requested that Allison bring to the hearing:

All documents referring or relating to your involvement with Sisters' Camelot, including but not limited to, IRS Form 1099 statements, work schedules (including but not limited to diaries, calendars, day planners, computer calendars, personal notes), amounts paid to you, your performance (including but not limited to promotions, demotions, commendations and receipt of any discipline, reprimand or counseling).

At the hearing, Allison produced two documents—his 2012 IRS Form 1099 and a work solicitation email to another employer. Under questioning from the Respondent, he subsequently acknowledged that he had “forwarded emails concerning Sisters' Camelot” to the General Counsel but had not produced these documents. The Respondent did not seek any clarification of the nature of these emails. However, it asked the judge to draw an adverse inference from Allison's failure to produce the emails, which it “believe[d] may contain information prejudicial to his claim.” The judge deferred ruling on the motion, and instead invited the Respondent to raise it in its posthearing brief. The Respondent did so, again requesting the sanction with little discussion, but the judge did not address the motion in his decision.

The Board may impose a range of sanctions for subpoena noncompliance, “including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party.” *McAlister Towing & Transportation Co.*, 341 NLRB 394, 396 (2004), *enfd.* 156 Fed.Appx. 386 (2d Cir. 2005). However, the Board must balance the need to protect its processes against its Section 10(c) mandate to remedy unfair labor practices. See *Toll Mfg. Co.*, 341 NLRB 832, 836 (2004). The Board is careful not to impose drastic sanctions disproportionate to the alleged noncompliance. See, e.g., *Teamsters Local 917 (Peerless Importers)*, 345 NLRB 1010, 1011 (2005) (reversing judge's dismissal of the complaint as sanction for party's noncompliance with subpoena, due to its harshness and “perhaps unprecedented” nature and the availability of lesser sanctions). The burden of establishing noncompliance lies with the party that directed issuance of the subpoena. See *R.L. Polk & Co.*, 313 NLRB 1069, 1070 (1994), *affd.* mem. 74 F.3d 1240 (6th Cir. 1996). Applying these principles, we reject the sanction requested by the Respondent.

First, the scope of the subpoena was not altogether clear. While the subpoena initially requested “[a]ll documents referring to or relating to [Allison's] involvement with Sisters' Camelot,” the subpoena's subsequent description of the requested documents suggested that it pertained only to personnel or work records.¹⁷ In this context, it would not have been unreasonable for Allison, who was unrepresented by counsel, to conclude that emails that he forwarded to the General Counsel were not among the “documents” sought by the Respondent. Certainly, there is no evidence that he intentionally withheld responsive information.¹⁸

Second, the Respondent has not shown any prejudice resulting from Allison's alleged noncompliance. At the hearing and in its exceptions brief, the Respondent, without explanation, merely asserted that it had been prejudiced. It made no offer of proof, noting in its brief only that Allison “is known to frequently blog and make posts

¹⁷ See NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings Sec. 11776 (“A subpoena duces tecum should seek relevant evidence and should be drafted as narrowly and specifically as is practicable. The use of the word ‘all’ in the description of records should be avoided wherever possible.”).

¹⁸ See, e.g., *Sunrise Senior Living, Inc.*, 344 NLRB 1246, 1246 (2005), *enfd.* 183 Fed.Appx. 326 (4th Cir. 2006) (rejecting motion for denial of discriminatees' make-whole remedy for giving allegedly false testimony, because “[a]lthough the judge discredited portions of the discriminatees' testimony, there is no evidence that the discriminatees engaged in deliberate and malicious misconduct that abused and undermined the integrity of the Board's processes”).

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on social media websites.”¹⁹ It in no way described the arguments or defenses that it had been unable to raise. Thus, we cannot determine what effect the emails might have had on Allison’s right to reinstatement and backpay. See, e.g., *CPS Chemical Co.*, 324 NLRB 1018, 1019 (1997), *enfd.* 160 F.3d 150 (3d Cir. 1998) (no prejudice from opposing party’s arguable noncompliance with subpoena duces tecum because “[t]he Respondent identifie[d] no valid point that it was unable to prove for lack of other requested documentation”); *Addressograph-Multigraph Corp.*, 207 NLRB 892, 892 fn. 2 (1973) (failure of judge to require opposing party to comply with subpoena duces tecum not prejudicial, as “[t]he record fails to reveal the significance of the additional information sought and how it would affect our conclusions herein”).

Accordingly, we find that the record does not establish that any sanction against Allison is warranted, much less the extreme and unusual sanction of denying reinstatement and backpay.²⁰

ORDER

The National Labor Relations Board orders that the Respondent, Sisters’ Camelot, Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that selecting a union representative would be futile by stating that it would never accept a boss/employee relationship with the canvassers.

(b) Granting benefits to employees in order to discourage them from engaging in union and other protected concerted activities.

(c) Discharging or otherwise discriminating against employees for supporting IWW Sisters’ Camelot Canvassers’ Union or any other labor organization.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Christopher Allison full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Christopher Allison whole for any loss of earnings and other benefits suffered as a result of the

discrimination against him, in the manner set forth in the remedy section of this Decision and Order.

(c) Compensate Christopher Allison for any adverse tax consequences of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Minneapolis, Minnesota facility copies of the attached notice marked “Appendix.”²¹ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 4, 2013.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

¹⁹ The Respondent introduced into evidence a compendium of Allison’s blog postings related to the Union’s ongoing organizing campaign. It does not argue that anything in these blog postings should affect Allison’s right to reinstatement and backpay.

²⁰ We also deny the Respondent’s request for an adverse inference regarding the emails and blog posts.

²¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

Dated, Washington, D.C., September 25, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT threaten you that selecting a union would be futile by stating that we would never accept a boss/employee relationship with the canvassers.

WE WILL NOT give you benefits in order to discourage you from engaging in union or other protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting IWW Sisters' Camelot Canvassers' Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Christopher Allison full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Christopher Allison whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate Christopher Allison for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Christopher Allison, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

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The Board's decision can be found at www.nlr.gov/case/18-CA-100514 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Tyler J. Wiese and James L. Fox, Esqs., for the General Counsel.

John C. Hauge and Adam B. Klarfeld, Esqs. (Ford & Harrison, LLP), of Minneapolis, Minnesota, for Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Minneapolis, Minnesota, on June 6 and 7, 2013. Christopher Allison, aka Shuge Mississippi, filed the charge in docket 18-CA-100514 on March 18, 2013. The IWW Sisters' Camelot Canvassers' Union filed the charge in docket 18-CA-105462 on May 20, 2013. The General Counsel issued a consolidated complaint on May 21, 2013.

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) in discharging Christopher Allison on March 4, 2013. He also alleges that Respondent violated Section 8(a)(1) in granting benefits to employees to dissuade them from engaging in union or other protected activities and in con-

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veying the impression to its canvassers that it would be futile to organize.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a nonprofit organization that collects edible food, which cannot be sold, and distributes it in low-income areas of Minneapolis-St. Paul. It also operates a community garden. Sister's Camelot does not sell food. It distributes food either as groceries or meals prepared in its kitchen busses. Respondent operates as a collective in which decisions are made by unanimous consent of the members of the collective.

The General Counsel alleges that it has jurisdiction over Respondent by a most slender thread. Respondent's gross revenue for calendar year 2012 was \$271,705.82. This exceeds the jurisdictional standard established by the Board in 1987 for social service organizations by \$21,705.82, *Hispanic Federation for Social Development*, 284 NLRB 500 (1987). The General Counsel alleges that Respondent is engaged in commerce within the meaning of the Act solely on the fact that Sister's Camelot purchased in excess of \$5000 of insurance for its vehicles (2 kitchen busses and one van used to transport canvassers) from a broker located in Minnesota.¹ This vehicle insurance was issued by Progressive Insurance Corp. Progressive, which is based in Ohio, receives revenues in excess of \$50,000 from states other than Minnesota.

Respondent does not cite any Board precedent in support of its contention that it does not have more than a de minimis impact on commerce. Board precedent, by which I am bound, supports that contrary position of the General Counsel, *A-W Washington Service Station*, 258 NLRB 164, 167-168 (1981). While Respondent may wish to argue to the Board that it should re-examine the jurisdictional standards set in 1987, I must adhere to current Board precedent, such as the case cited above and *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1110-1111 (2000). Thus, I find, that Sister's Camelot is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. However, whether the Union, the IWW Sister's Camelot Canvassers' Union, is a labor organization within the meaning of Section 2(5) of the Act, depends upon whether Respondent's canvassers are "employees" as defined in Section 2(3) of the Act, as the General Counsel alleges. Respondent asserts that the canvassers are "independent contractors," who are excluded from the definition of "employee" in Section 2(3). This is the most difficult issue in this case.

The Independent Contractor/Employee Issue

The Board's general principles for determining whether an individual is an "employee" or "independent contractor" are set forth in *Roadway Package System, Inc.*, 326 NLRB 842 (1998), and *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998).

¹ According to GC Exh. 4, Respondent's profit and loss statement for 2012, it spent \$6627 on vehicle insurance in 2012.

These principles are stated in summary form in *BKN, Inc.*, 333 NLRB 143 (2001).

Respondent, as the party asserting that its canvassers are independent contractors, has the burden of establishing that status. The Board applies the common-law agency test which includes examination of the 10 factors, "among others," no one of which is controlling. Not surprisingly, the parties have very different perspectives as to how these factors should be evaluated. Rather than summarizing the facts regarding canvassing work at Sister's Camelot, I will discuss these facts in conjunction with the relevant factors, in order to avoid undue repetition. Generally the canvassers go door to door soliciting donations. Some of the more salient aspects of their job are that they are not required to work at any time they do not wish to do so, they are generally paid 40 percent of the donations they collect and that they are totally unsupervised when they are canvassing.

My analysis of each of these factors is as follows:

Factor 1: The control that the entity exercises over the details of the work. The General Counsel emphasizes that canvassers are required to solicit territory assigned to them by Sister's Camelot. This is true in the sense that canvassers who show up on a particular afternoon must only canvass in the area depicted on a map that they select randomly from maps which are presented to them face-down by a canvass coordinator.² It is obviously counter-productive to have more than one canvasser solicit donations at the same residence on the same day.

However, canvassers also have an opportunity to select an area in which to solicit. They can ask permission from the canvass coordinator to canvass an area previously canvassed with a call-back sheet. This is a list of residences in a previously canvassed area. With the aid of the call-back sheet, the canvassers can knock on doors which were not answered during the prior canvassing.

Respondent requires canvassers to complete a legible call back sheet. This includes the name of the canvasser, total amount of money collected, whether the donation was made by cash or check, and a record of the doors each canvasser knocked on. These sheets are used when re-canvassing an area recently canvassed. They are also used to determine which canvasser gets credit and a commission on checks that are mailed into Sister's Camelot.

The General Counsel argues that employees can be disciplined for canvassing outside their assigned area. However, such discipline is not a reprimand, a suspension, or termination, but rather turning over any donations to the canvasser who was assigned the area.

While Sister's Camelot sets the starting time for a canvass, nobody is required to work on any particular day. Showing up

² The general issue of what areas Sister's Camelot may canvass and on what dates is set in a meeting with other organizations that canvass for donations. Obviously, it is not in the interest of any of the organizations to be soliciting on the same block the same day. A donor is far less likely to donate to one organization if he or she donated to another similar organization very recently.

for work is completely at the discretion of each canvasser.³ There is no requirement that a canvasser inform Respondent whether or not they plan to show up for work. Also, what the canvasser does during the canvassing period is entirely up to the individual, i.e., whether to work during that period or goof-off. With the exception of their first day on the job, there is no supervision of how a canvasser performs his or her job. Respondent also does not have a dress code, or production quota. These factors strongly indicate independent contractor status.

Respondent has a few rules that its canvassers are required to follow: (1) don't lie; (2) tell donors for whom they are soliciting; (3) describe what Respondent does; and (4) leave a residence as soon as a resident indicates an unwillingness to donate. Beyond observance of these rules, a canvasser is free to make whatever presentation (or "rap") he or she wishes to a prospective donor.⁴ Moreover, Respondent makes no attempt to check to see if canvassers are following its rules.

While Sister's Camelot generally sets the time at which canvassing must cease, this is often determined by local ordinance.

The General Counsel also relies on less than a dozen instances in which Respondent has disciplined canvassers. Many of these instances involve inter-personal relationships with other canvassers. Most of the evidence regarding discipline concerns incidents prior to 2009 when Christopher Allison was a canvass coordinator. Since canvassers generally work an area in pairs there have been several instances in which canvassers have been orally reprimanded for hostile and otherwise inappropriate interactions with other canvassers.⁵ There have been

³ Obviously, reasonable people can disagree as to how these factors are to be applied. I would note that the freedom to show up whenever one pleases appears in some cases to be an extremely important factor in distinguishing an employee from an independent contractor, compare *Pennsylvania Academy of the Fine Arts*, 343NLRB 846, 847 (2004) [freedom to control their own schedules and thus control their earnings strongly supports independent contractor status] with *Lancaster Symphony Orchestra*, 357 NLRB No. 152 (2011).

Contrary to the argument at pages 55–56 of the General Counsel's brief, the fact that canvassers cannot subcontract is irrelevant to this case. Virtually anybody who wants to canvass can show up at Respondent's office and sign an independent contractor agreement. This record reflects only one recent instance in which somebody who wanted to canvass was denied the opportunity, Tr. 238. This involved a person known to Aaron Barck, a collective member and canvass coordinator, to have a history of violent and abusive behavior, Tr. 369. There is no need for a prospective canvasser to subcontract from another canvasser.

⁴ Respondent contrasts this from other canvassing organizations that require canvassers to follow a script.

⁵ I would include in this category the instance(s) in which a canvasser was verbally reprimanded for neglecting to show up at the van pick-up point the end of a shift without notice, thus leaving everyone else waiting indefinitely to return to Respondent's offices.

Not all the General Counsel's testimony regarding discipline is credible. Witness Bobby Becker testified that Tracy Steidl was suspended for a month in the summer of 2012, Tr. 231. Respondent's financial records, R-9, contradict his testimony. On the other hand, these records do indicate a 1-month gap in Alex Forsey's canvassing activities during October 2012. That is consistent with Becker's testimony that Forsey was suspended for sleeping in Respondent's van. I decline to take Becker's testimony at face value generally. At Tr. 238, he testified that

other situations in which canvassers have not been allowed to canvas anymore, or for a certain period of time. One of these involved a canvasser who was suspended for a month for sleeping in Respondent's van with a friend in 2012. No person has ever been disciplined for inadequate or poor performance of their canvassing functions.

There is no indication in this record that Respondent maintains personnel files for the canvassers or that discipline is documented in any formal way.⁶ There is no evidence that canvassers are given performance evaluations or that Respondent monitors their job performance in any way other than paying them 40 percent of the donations they receive.

Factor 2: Whether the individual is engaged in a distinct occupation or work. The General Counsel contends that the fact that canvassers must tell prospective donors that they are canvassing for Sister's Camelot is an indication that they are employees. Respondent argues that the fact that canvassers may canvas for other organizations is a factor weighing towards deeming them independent contractors. While one cannot solicit for another organization during a Sister's Camelot canvas, there is nothing that prohibits a canvasser from soliciting for another organization the next day, or even the same day during a different time period. Moreover, a person is free to canvas for another organization on any given day rather than Sister's Camelot. Generally, employees are not free to work for a competitor during their regular workshift at their employer's facility.

Factor 3: The kind of occupation, including whether in the locality in question, the work is usually done under the employer's direction or by a specialist without supervision. This factor cuts in favor of independent contractor status. The canvassers work with virtually no supervision. While one might call an experienced canvasser a specialist, the job requires minimal training. Success as a canvasser appears to depend on certain personality traits; i.e., persistence, a gift for gab and a thick skin.

Factor 4: The skill required in the particular occupation. Canvassing requires little training. As discussed above, the skills necessary to be a successful canvasser appear to be largely personality traits as opposed to knowledge one acquires through education. Experience in canvassing may also be of assistance. Moreover, it is likely that one without the necessary personality traits will quickly give up on canvassing due to the lack of positive reinforcement, i.e., cash. Unskilled work weighs in favor of employee status, *St. Joseph News-Press*, 345 NLRB 474, 479 (2005).

Factor 5: Whether the employer or the individual supplies the instrumentalities, tools and the place of work. Respondent supplies the place of work for its canvassers, i.e., the territory that it plans to canvas on a particular day. There is little in the way of tools or supplies for this job. Respondent makes vari-

he declined to hire 5–10 percent of the individuals who wanted to canvass. Shortly thereafter Becker testified that he had never turned anyone down.

⁶ In fact the only documentation of discipline is a 1 month suspension in 2001 or 2002 which is contained in the minutes of a collective meeting, GC Exh. 14.

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ous flyers available to the canvassers, which they can choose to use or not use, Tr. 359. It also supplies maps of the canvassers' assigned "turf," whatever permits are required and generally supplies a clipboard and possibly a piece of paper or call-back sheet on which to document the results of the canvass. Respondent also, with few exceptions, provides transportation to and from the canvassing area with its van.

Factor 6: The length of time the individual is employed. Unlike some independent contractor situations, the canvassers are not retained for a limited amount of time, or to perform a task with specified duration. Canvassers may continue to canvass for Respondent for as long as they wish and a number of these individuals have been canvassing for Sister's Camelot for years. Respondent's financial records (R Exh. 9), indicate that approximately 40 individuals canvassed for it in 2012; some on a regular basis, others only on a few occasions.

Factor 7: The method of payment, whether by time or by the job: Canvassers are paid neither by the time they spend canvassing or a lump sum for a particular task. They are paid a percentage (generally 40 percent) of the donations they obtain from going door to door. I find that the method of payment strongly indicates independent contractor status.⁷ How much a canvasser earns depends largely on how often he or she chooses to canvass and how hard and how efficiently they work while canvassing.

Factor 8: Whether the work in question is part of the employer's regular business. Contrary to the contention of the General Counsel, I find that the canvassers' job is not part of Sister's Camelot's regular business. Respondent's regular business is distributing free food. The canvassers do not participate in obtaining the food to donate or in its distribution. Their job is to raise money for functions that support Respondent's regular business, such as licensing and maintenance of its vehicles, wages for office staff, solicitor permits, etc. (GC Exh. 4).

Factor 9. Whether the parties believe they are creating an employment relationship. Canvassers sign an independent contractor's agreement. They receive a Form 1099, rather than a W-2 tax form and are told that they are independent contractors (Tr. 154, 158).

Factor 10: Whether the principal is in the business. Respondent does not have individuals who are clearly employees whose sole function is to canvass. For example, David Senn, who works in the community garden, appears to be an employee and is paid a wage (R Exh. 9). No person who only canvasses is compensated in the same manner as Senn.

Considering all these factors, particularly the fact that canvassers are free to work on any given day or not; the method of compensation; that their compensation depends largely on the time and effort put into their work; and the lack of supervision while canvassing, I conclude the canvassers are independent contractors. I therefore will dismiss the complaint in its entirety.

⁷ In the summer of 2012, the collective approved a canvasser pay scale, GC Exh. 17, Tr. 62-63. Besides the commissions set forth in the pay scale, the collective provided for a \$40 stipend for canvassers who have been approved by a canvass coordinator to train new canvassers. I am unaware of evidence that Respondent ever paid this stipend to any canvasser.

ty. However, given the possibility that a reviewing body may conclude otherwise, I will address the merits as if the canvassers are ultimately found to be employees.

II. ALLEGED UNFAIR LABOR PRACTICES

The Chronology of the alleged unfair labor practices

On February 25, 2013, a group of canvassers attended the regular Monday morning meeting of the governing body of Sister's Camelot, its collective. Six of the seven members of the collective, Eric Gooden, Clay Hansen, Aaron Barck (aka Muskrat), David Senn, Lisabeth Forster-Bayless, and Bobby Becker were present. One collective member, Laurel Hendershot (aka Clive North) was absent.

The canvassers read and distributed a statement to the collective. The statement informed the collective that the canvassers had formed the IWW Sister's Camelot Canvassers Union and that the Union was demanding that the collective start negotiating with it on Friday, March 1. Christopher Allison was among the canvassers attending the meeting.

A group of about 12 canvassers met with all 7 members of the collective on Friday, March 1 at 10. A list of 18 demands was read and distributed to the collective by the representatives of the Canvassers' Union (GC Exh. 10). Christopher Allison was one of three canvassers who read the demands. Some of the demands that were ultimately related to Allison's termination was (1) A system to take credit card donations at the door; (6) Union chooses two co-canvass coordinators via democratic election; (13) Canvass credit card only to be used for office supplies, gas and canvasser appreciation; (14) Canvass coordinators have full access to online donations, mail in contributions, and the ability to pay canvassers out weekly.

The canvassers then announced that they were leaving the meeting and would return in an hour. The canvassers stated that after that hour they expected the collective to bargain in good faith with the Union. An IWW representative called collective member Clive North (Laurel Hendershot) and asked if the collective would meet several of the Union demands to prevent a strike (Tr. 55).⁸ When the canvassers returned, Lisa Foster-Bayless stated either that the collective would not bargain with the Union or would not do so at that time.⁹ The Union then announced it was going on strike. As of June 7, 2013, there had not been any canvassing performed for Respondent since March 1.

Later on March 1, John Snortum, who had acted as spokesperson for the canvassers at the meeting, called collective member Clay Hansen. Snortum asked if the collective could meet 3-4 of the Union's demands as a way of demonstrating the collective's good faith.¹⁰ The collective met over the week-

⁸ The IWW representative, Kevin, who was not a canvasser, did not testify. Thus North/Hendershot's testimony on this point is uncontradicted. Therefore, I credit this testimony.

⁹ I find it unnecessary to resolve the differences in the witnesses' testimony on this point.

¹⁰ Snortum did not testify. Hansen's testimony regarding this conversation is uncontradicted and credited.

end to discuss whether it could meet any of the Union's demands.¹¹

There was another collective meeting on Monday, March 4. Canvasser John Snortum read and distributed a prepared statement to the collective (GC Exh. 11). Collective member Lisa Foster-Bayless read and distributed 2 statements. In the first (GC Exh. 12), the collective declared that, "we cannot accept any terms which forces us into the role of bosses."

The collective also announced several changes to Respondent's policies: one member from the canvasser union, chosen by the Union, could become a member of the collective immediately. In addition, other canvassers could apply to become collective members if they fulfilled the following requirements for three months: 8 volunteer hours or 12 paid canvas shifts per calendar month; participation at least once each year in each current program area; attendance and participation at all weekly meetings, maintenance of a weekly time card for hours worked or volunteered.¹²

The second statement (GC Exh. 13), stated that the collective was terminating Christopher Allison's contract immediately and that he would not be allowed to work, volunteer or be associated in any way with Respondent.

Christopher Allison had been associated with Sister's Camelot on and off since 2001. At times he had been a member of the collective. In about 2006 or 2007, he stole a mailed-in donation that belonged to another canvasser. He apparently self-reported this theft and returned the check.¹³

In 2009 there were additional allegations of theft against Allison, Tr. 77. The collective discussed these allegations in one of its meetings. Afterwards Allison resigned and had no involvement with the organization for 2 years.

In 2011, apparently without the knowledge of some or all the members of the collective, Allison signed a new independent contractor agreement with Respondent and began canvassing again for Sister's Camelot. Although some members of the collective wanted to terminate this agreement, they were unable to do so because the collective decides by unanimous vote. Hardy Coleman, then a member of the collective, blocked the termination of Allison's contract.¹⁴

In 2012 Allison acted as a field manager for one shift. Hardy Coleman, then a canvass coordinator, delegated his functions for some shifts to Allison and others (Tr. 304). However, the collective prohibited Allison from running a shift after that one occasion. Allison also unsuccessfully sought readmission to the collective in 2012. One member of the collective told Allison that he would prevent Allison from joining the collective because Allison was a thief.

¹¹ Collective member Bobby Becker was excluded from these deliberations due to his sympathy for the Union's demands.

¹² On March 6, in an online newsletter, the collective agreed to four more of the Union's demands; a system to take credit card donations at the door; professional van maintenance; coverage of medical bills for work-related injuries and more paid training of up to 3 days, GC Exh. 5, p. 14.

¹³ Members of the collective in March 2013 apparently believed Allison stole checks on at least 2 occasions, GC Exh. 13.

¹⁴ Coleman ceased to be a member of the collective in 2012.

Allison canvassed 4–6 times a week and earned almost \$10,000 canvassing for Respondent in 2012 (R. Exh. 9).

The collective's March 4, 2013 statement recounted Allison's history with Sister's Camelot and then stated, "In his time back at the canvass, Chris has continued to be the same manipulative and disruptive presence that he was before, and has demonstrated no willingness to be accountable for his past actions or transform his future behavior." With one very minor exception, there is no evidence in this record of misconduct by Allison between the time he resumed canvassing in 2011 and his termination in 2013. He received one verbal warning during this period for publicly chastising another canvasser for displaying drug paraphernalia.

The collective stated it could not negotiate in good faith with the Union as long as Allison had any connection to Respondent. A Union representative informed the collective that it would not negotiate with Respondent in view of the termination and the union canvassers walked out of the building.

Analysis

Respondent has essentially conceded that Christopher Allison's contract or employment was terminated in part because of the Union's demands between February 25 and March 4, 2013 (Tr. 301–302) [testimony of collective member Eric Gooden]. But for these demands and Allison's role with respect to these demands, he would not have been terminated. Thus, if he was an employee, his termination clearly violated Section 8(a)(3) and (1), *Phoenix Transit System*, 337 NLRB 510 (2002).¹⁵

Respondent's concerns regarding Allison are not a valid defense to the complaint. It could have negotiated with the Union, for instance, to bar Allison from becoming a collective member or canvass coordinator. Respondent did not have to terminate Allison as a result of the Union's demands. I would note that a remedy for Christopher Allison, if his termination is found to violate Section 8(a)(3) and (1), would be reinstatement to his position as a canvasser and backpay. It would not require giving him access to the financial information demanded by the Union in March.

With regard to the 8(a)(1) allegations, if the canvassers are employees I would find that Respondent violated the Act by indicating it would never accept an employer-employee relationship with the canvassers. This I take is an indication that organizing would be futile because Respondent would never bargain with the Union as the representative of the canvassers. As a remedy Respondent would be required to post the traditional Board notice.

On the other hand, I would dismiss the allegations that Respondent violated the Act in granting benefits to discourage employees' union activities. The benefits offered were offered in direct response to requests from the Union and John Snortum's requests for such action.

¹⁵ An analysis under the *Wright Line*, 251 NLRB 1083 (1980) doctrine is inappropriate in this case. The timing of Allison's termination clearly establishes that he would not have been terminated but for his union activities and that of other canvassers.

SISTERS' CAMELOT

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁶

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopt-

ORDER

The complaint is dismissed.

Dated, Washington, D.C., August 7, 2013.

ed by the Board and all objections to them shall be deemed waived for all purposes.