THE COURTS COME THROUGH FOR WORKERS: TWO GOOD VICTORIES

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RECENTLY, TWO EXTREMELY important decisions were rendered by the courts that are worth mentioning to all union activists and musicians. It is very heartening to see that there are judicial opinions being issued in this country that are favorable to organized labor.

The first case is the culmination of a nine-year battle for the members of the Lancaster Symphony to obtain the right to organize and bargain collectively with orchestra management. In Lancaster Symphony Orchestra v. National Labor Relations Board (Index No. 14-1247), the U.S. Court of Appeals for the District of Columbia Circuit sustained the NLRB's determination that orchestral musicians are employees and not independent contractors. (Why is this important? Remember that only employees have the right to form a union.)

Relying upon the "right of control test," which is the common law standard for determining whether a worker is an employee or independent contractor, the Court of Appeals found that the role of the conductor was the tipping point in favor of determining that musicians are employees. The court noted that based upon the conductor's pronounced control over the orchestra, it was clear that the Lancaster Orchestra closely supervises the "means and manner of the musicians' performance." While musicians do practice on their own, it is the conductor who directs how they perform.

On the other hand, however, the court noted that freelance musicians enjoyed some entrepreneurial risk since they can choose other work over performing for the orchestra. This combined with the fact that orchestral musicians supplied their own instruments were indications that the musicians could be considered independent contractors. Since the facts presented two fairly conflicting views of how musicians worked, the court deferred to the board's original interpretation. Thus, these musicians have now definitively been proclaimed to be employees.

What the future holds in store for these determined and resilient musicians remains unknown. It is clear, however, that they have the persistence and drive to achieve a beneficial labor agreement. I am sure the labor community will be watching the outcome of this story very closely.

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THE SECOND DECISION, International Association of Machinists District 10, vs. Wisconsin, was issued by a Circuit Court in Wisconsin that held that the state's right-to-work legislation was unconstitutional under the terms of the Wisconsin state constitution. Remember, right-to-work laws permit workers to opt out of paying union fees even while they enjoy the benefits of a union contract. (We call these kinds of workers "free riders"!) The judge held in Wisconsin that permitting employees to receive services under a collective bargaining agreement without requiring them to pay for those services was an unconstitutional "taking of the unions' property without just compensation." The opinion in this case determined that the only constitutionally permissible consequence for employees who are members of a bargaining unit who decline to join the union is to require them to pay for their fair share in the form of union fees, which are technically called "agency fees." (I wrote about agency fees in my January column.) Here, the free rider problem was solved by applying constitutional theory.

The Wisconsin decision showed that free riders are illegally "seizing" union resources by not paying for their union representation. The logic and wisdom of this decision is sound. It's a victory for Wisconsin workers, and one that we hope sticks.

However, it's significant to note that up until now, every other court that has considered right-to-work laws around the land have found them to be legally permissible. The arguments are often technical. Courts find that union *do* receive "compensation" for representing workers, even free riders. This "compensation" is simply the exclusive right to represent all workers. However, these courts have failed to take into account the fact that it costs money for unions to fully and fairly represent bargaining unit members – especially if they are not dues-paying members. In this case exclusive representation reflects a burden rather than a benefit. The only way to rectify this burden is to compel payment by all workers who receive the benefit of a union contract.

Hopefully more courts will adopt the reasoning in the Wisconsin decision, which is the first to advance it. This trend, if it becomes one, may result in national legislation that outlaws right-to-work legislation on the basis that free rider status constitutes an improper taking of union property without just compensation.