

ACTS OF GOD

When is it OK to cancel a concert and not pay the musicians?

**LEGAL
CORNER**
HARVEY MARS,
ESQ.



Harvey Mars is counsel to Local 802. Legal questions from members are welcome. E-mail them to HsmLaborLaw@HarveyMarsAttorney.com. Harvey Mars's previous articles in this series are archived at www.HarveyMarsAttorney.com. (Click on "Publications & Articles" from the top menu.) Nothing here or in previous articles should be construed as formal legal advice given in the context of an attorney-client relationship.

MUSICIANS ALL KNOW that unanticipated situations can cause shows to be delayed or canceled. Performing can, in some circumstances, be dangerous or impossible. For instance, an electrical system failure or other technical problem may arise during a performance. An instrument may get damaged. A snow storm or flash flood may cause cancellation or delay. Recently, acts of terrorism have been added to the ever-expanding list. Many of these fall under the rubric "Act of God," which we can define as an unanticipated natural occurrence beyond anyone's control that renders performance impossible.

In the legal world, Acts of God are typically addressed in contractual provisions



Superstorm Sandy ripped through New York City in 2012, causing damage to places like Breezy Point (above). Extreme weather can trigger "Acts of God" clauses in our contracts, which means performances get canceled and musicians don't get paid.

known as *force majeure* clauses. The term *force majeure* has Latin roots meaning "superior force" and "chance occurrence, unavoidable accident." If a *force majeure* event is triggered in a musical setting, and if the contract has the right language, it typically will excuse both parties from performance. Thus, musicians are not required to perform when an Act of God occurs. Likewise, employers are not required to pay. Such clauses guide and establish the mutually acceptable circumstances when contractual terms need not be complied with. They in effect are an outgrowth of the common law concept known as impossibility of performance. Under contract law, a breach of contract will sometimes be excused if performance becomes impossible. For instance, a performance may be excused if the featured performer is incapacitated due to illness or accident.

After the terror attacks of Sept. 11, 2001 and natural disasters such as Hurricane Katrina and Superstorm Sandy, more and more Local 802 contracts now include *force majeure* provisions. Without the incorporation of such provisions into our agreements, it would be extremely difficult to ascertain whether common law principles would excuse performance. This either results in litigation or labor conflict. So *force majeure* clauses are not necessarily a bad thing. It is often wise for labor and management to jointly agree on what circumstances would qualify as *force majeure* events so terms are established long prior to a conflict arising. For instance, for the first time Local 802's collective bargaining agreement with the Broadway League and Disney now contains a *force majeure* clause that in certain circumstances would

permit cancellation of rehearsals or performances without penalty.

As can be imagined, *force majeure* provisions can be extremely detailed and exhaustive since the list of events that might qualify non-performance is almost immeasurable. In years past, a cancellation clause might have been limited only to traditional natural events such as storms, floods or fire. However, limited clauses are no longer the norm, as the universe of acceptable reasons why a performance must be canceled without penalty has rapidly expanded. This is particularly true for collective bargaining agreements such as the ones covering the New York Pops and the American Symphony Orchestra, which contain strict cancellation terms that require payment in the event a service is not canceled or rescheduled within a particular time frame. These agreements

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now detail specific events that would suspend operation of the cancellation notification terms. See the yellow box below to see how the New York Pops spells out all of the events covered by force majeure. It's a mouthful, isn't it? Note that the term "Act of God" is only one of several included within this clause. ASO has a similar provision. However, it also has a section that excludes outdoor services from its scope. It provides that "outdoor services cancelled due to inclement weather shall not be considered a Force Majeure event and, where possible, will be shifted, and musicians paid, to previously scheduled 'rain dates.' When the Music Director is unable to fulfill his performance obligation due to injury, illness or death, the Assistant assigned to the affected service(s) will perform."

As I had noted previously, acts of terrorism are now included within force majeure clauses, even though they can hardly be considered "Acts of God." It's an awful consequence of the political climate we now live in. Now more than ever, professional musicians must become familiar with the force majeure provisions contained in the contracts they work under and be flexible in the event an incident happens that triggers their application.

MORE ON THE WANG THEATRE

A year ago, in my March 2016 column, I wrote about a union representation election petition that was filed by musicians who performed at the Wang Theater in Boston. I am happy to report that AFM Local 9-535 prevailed in the election and is now the certified exclusive representative of the musicians who perform there. However, in an effort to test the legal validity of the certification order, the Wang Theater has refused to commence bargaining with the union. The union therefore filed an unfair labor practice charge in order to validate its certification.

On Feb. 14, the NLRB reaffirmed its order finding that the Wang Theater had committed an unfair labor practice by refusing to bargain with the union. Hopefully, bargaining will commence shortly. However, there is a sign that all is not settled at the NLRB. The labor board noted that the Wang Theater's status as an employer has presented a substantial issue for future resolution. It is significant that this point was raised by the NLRB's only Republican member, Acting Chairman Philipo A. Miscimarra. We can expect more on this issue as the legal complexion of the board becomes inevitably more aligned with Mr. Miscimarra's point of view.

The New York Pops spells it out

Here's how the New York Pops contract defines force majeure...

"Acts of God, fire, casualty, physical disability, the acts or regulations of public authorities, labor difficulties, lockouts or strikes involving or caused by labor organizations other than the Union, civil tumult, war, riot, blackout, Emergency Alert System (EAS) notifications, act of public enemy, epidemic, extreme weather events, including, without limitation, those which cause federal, state or local governments or agencies under their jurisdiction to close event venues for safety purposes, explosions, floods, shortages of energy or other essential services, failure of technical facilities or delay of transportation, death, disability, injury or other inability to perform or any other cause of similar nature beyond the parties' control, act(s) or threats of terrorism, insurrections, riots or other forms of civil disorder in, or around, the engagement venue or which Management and/or Musicians reasonably believe jeopardizes the safety of Musicians, and/or of their equipment. For avoidance of doubt, with respect to outdoor concerts, forecasted inclement weather that would likely result in potential damage to Musicians' instruments or would cause the venue for such performance(s) to cancel or postpone such performance based on such forecasts, shall be included within the definition of 'Force Majeure Event.' In connection with a Force Majeure Event, the parties shall respectively be relieved of their obligation to present services at the scheduled or at a different time or, consistent with Paragraph C above, to compensate the Musicians for the scheduled services."



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