'UNDER DURESS'

Is it legal for musicians to go on strike a few minutes before a concert?

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IMAGINE THIS SCENARIO. A group of musicians is being treated unfairly. The pay is pitiful and there are no benefits. The musicians decide to demand better wages and better treatment. On opening night, right before curtain, the musicians decide to strike unless the music director agrees to pay more. The director is furious, the audience is getting restless, and the pressure is mounting. The director relents and says O.K. Later, the director says that the agreement is not valid because he signed "under duress." Is this true? Does the director have a claim?

Actually, you don't have to imagine any of that. This is a typical, real-life strategy, one that musicians employ all the time with Local 802's encouragement and blessing. Why? It works!

But is it legal?

One of the more prominent defenses raised by employers I have encountered is that they signed their agreement with the union under duress. These employers argue that they were forced to sign, and that since they did not do so willingly, they cannot be bound by its terms.

While this argument may hold some weight when courts consider general consumer or commercial contractual claims, in the realm of labor management relations, it is generally ineffective as a defense.

This was no less the case when an arbitrator recently considered this defense in the context of a single engagement performance at the Beacon Theatre by the "Three Irish Tenors" on Dec. 16, 2010.

There, the producer refused to pay health benefit contributions and wage premiums for the musicians who had performed for this engagement, allegedly because they were forced to sign the agreement under duress. The "duress" was that musicians would not perform without a contract!

In his ruling, the arbitrator held that a "threat by employees, through their union representatives, to withhold labor in order [to] pressure an employer to agree to lawful contractual terms is entirely proper."

What the producer called "duress," was actually labor relations!

This ruling is entirely in accord with long-established principles of labor law, though it might be contrary to basic tenets of contract law. (In contract law, if one party is holding a gun to your head forcing you to sign a contract, that is usually considered duress! But a strike by workers is not the same.)

The situation with the Three Irish Tenors was not the first time that producers have tried to use "duress" as a defense. Several years ago, the Opera Company of Brooklyn made the same argument before the New York State Employment Relations Board in response to Local 802's efforts to enforce a ban on the virtual orchestra machine.

The company asserted that it had "involuntarily" agreed to a contract that contained the ban because musicians threatened to strike the performance. Duress, they argued, justified the contractual breach. But there too the company's defense was rejected. The ban was deemed enforceable. There was no "duress."

There have been countless other occasions where this defense has been raised. In each instance it has been found without merit.

The threat of a strike, or picketing, or economic sanction is not a valid defense to the claim of "duress." This is because such a threat is considered to be protected activity under the National Labor Relations Act.

Section 7 of the NLRA protects workers who are engaged in concerted activity for their mutual aid and protection. The threat of withholding labor – in other words, a strike – is the purest form of concerted activity.

In 1960, the Supreme Court held that economic pressure will not invalidate any resultant collective bargaining agreement because "there is simply no inconsistency between the application of economic pressure and good faith bargaining." *National Labor Relations Board v. Insurance Agent International Union, 361 U.S. 477.*

The National Labor Relations Board has time and again validated this ruling by finding while "tough and sometimes distasteful tactics [are] engaged in by employers and unions throughout the collective bargaining process, these tactics are frequently not unlawful under the National Labor Relations Act." *Telescope Casual Furniture Workers, Inc., 326 NLRB 588 (1998).*

It is always preferable to achieve a collective bargaining agreement that both labor and management believe was voluntarily and mutually achieved.

Unfortunately, voluntary agreements are not always possible.

In the case of the Three Irish Tenors, musicians were being asked to perform at a major venue for rates well below our area standards.

In those circumstances, in order to preserve prevailing venue wage and benefit rates, a strike threat may be warranted.

It is good to know that contracts entered into under those extreme circumstances will be deemed legally valid and binding.

As for the wages and benefits owed to the musicians who performed with the Three Irish Tenors, unfortunately the producer has not yet complied with the arbitrator's decision. Even though Local 802 won the case, the employer still hasn't paid up. We have filed suit to enforce the awards in U.S. District Court, and we'll keep you posted.

LOSE YOUR GIG?

If you've been playing a steady engagement (such as a Broadway show), and the show closes or the gig ends, can you apply for unemployment benefits? Yes! See **www.TinyURL.com/MusicUnemployment** for all the details.

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.