

# THE NUCLEAR OPTION

*If you are forced to go on strike – or if you get locked out – there are some things you must know...*

## 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](mailto:HsmLaborLaw@HarveyMarsAttorney.com). Harvey Mars's previous articles in this series are archived at [www.HarveyMarsAttorney.com](http://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.

**WHEN IT COMES** to negotiations, the nuclear option for workers is the strike. No one likes to strike, but if an employer is simply not budging, it is often the only way to achieve an agreement. On the management side, its nuclear bomb is the lockout.

Both strikes and lockouts mean that workers aren't working. In the case of strikes, it's the workers who have decided not to work; in the case of lockouts, management has chosen to shut down the workplace as a punitive measure.

Like any weapon, the effect of a lockout or strike can be devastating on all sides. In fact, they can be irreparable. Consider the recent 14-month lockout of the musicians of the Minnesota Orchestra. The consequences will be felt by the musicians, board and community for years to come.

However, there are ways to weather the tempest and come out the other side

relatively intact. First and foremost, musicians who are locked out or on strike should take some comfort in the knowledge that through solidarity, your brothers and sister members of other locals and other musical organizations will dig deep to provide financial support. It was nothing short of amazing to witness how members of the AFM donated \$70,000 to the AFM Local 30-78 (Minneapolis-St. Paul) at the AFM convention last year during the Minnesota lockout. Yes, we take care of our own. And there are also legal protections in New York state that provide additional support to striking or locked out workers.

First and foremost, New York is one of the few states in this country that provides unemployment benefits to striking or locked out employees.

Section 592 (1) of the New York State Labor Law provides that "the accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after such claimant lost his employment because of a strike or other industrial controversy, except for lockouts."

What this section means essentially is that when workers are engaged in a strike, even one that is a "wildcat strike" (i.e. not sanctioned by the union), they will qualify for unemployment benefits seven weeks after the strike commenced. On the other hand, if employees are locked out, there is no waiting period at all: eligibility for unemployment benefits commences immediately. The reason for this distinction is that a lockout is considered an involuntary separation from employment. A strike, is to some extent, is by choice. As a labor advocate and unionist, I do not necessarily agree with this distinction. However at present, this is the way the law is structured.

The maximum unemployment benefit is currently \$405 per week. On top



Musicians in the Detroit Symphony Orchestra struck for six months in 2010-2011.

PHOTO: HART HOLLMAN

of this, striking or locked out employees may be entitled to strike benefits, depending upon their union's bylaws and constitution. (Local 802 does offer strike benefits, which are considered and administered by the Executive Board.)

Some more good news is that the New York Department of Labor has declared that strike benefits are not considered remuneration for purposes of the Unemployment Insurance Law. Section 490.2 of the administrative regulations states that "payments made by labor unions to persons performing picket services are not 'remuneration' within the meaning of the Unemployment Insurance Law." What this means is that any compensation received for picket service or any strike benefit received will not offset unemployment benefits. Thus an employee can receive unemployment benefit as well as strike benefits, at the same time. (It should be noted, however, that strike benefits are considered income and are subject to income taxation.)

There are other ways that income can be supplemented for employees who have lost employment due to a strike or lockout. One way is for the workers themselves to create a nonprofit organization to collect charitable donations,

which can be used to benefit workers if they strike or become locked out. Recently, the Metropolitan Opera Orchestra Committee created a 501(c)(3) tax-exempt corporation to collect such donations. The Met Committee has also created a tax -xempt Voluntary Employee Benefit Association (VEBA) to help defray medical costs and provide supplemental unemployment benefits to musicians who might need financial support in the event there is a strike or lockout at the Met.

There are also outside organizations that can assist striking or locked out employees who require financial assistance. For instance, during the Minnesota lockout, an independent nonprofit organization known as Working Partnerships established a hardship fund for the exclusive use of locked out musicians.

In the course of labor relations job actions are inevitable. Sometimes, it is just the way things must evolve. Workers faced with the prospect of a strike or lockout, however, have a huge burden ahead of them. With careful planning, solidarity, and advance knowledge of the legal protections that are available, the storm can be weathered and workers can win their contract.