

When Neshoma Orchestra was hit with **\$1.2 million** in pension liability, it sued Local 802

Now a U.S. District Court **has announced a decision in the case.** Every musician needs to understand the result...



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LAST MONTH, I wrote about what happened when a candy company tried to exclude new workers from an industry-wide pension fund. That story had a happy ending for the workers, for the moment. This month, I have another pension story that's closer to home – but the ending is far from happy.

First some background. Everyone knows that negotiations sometimes fail, especially when workers first come together to form a union. (Cornell estimates that 52 percent of first-time bargaining units fail to achieve a first contract even after one year of bargaining.)

On the other hand, it is rarer – but not unheard of – that workers and their employer can't come to an agreement in a longstanding bargaining relationship. Sometimes the result may be a strike or a lockout. After the course of good-faith bargaining has concluded, the employer

may unilaterally impose the terms of its final offer, thus achieving an imposed – but nevertheless binding – agreement. Sometimes the consequences are even more severe: the employer ceases to operate. This has occurred two times in bargaining that I have been involved in.

The first occasion involved the Goldman Band. There, the bargaining unit was no longer willing to accept further wage decreases and service cuts. They failed to ratify the employer's last and final offer. As a result of its inability to produce concerts under the status quo terms, the employer dissolved. Efforts to revive the band have to this date failed.

The second occasion was with the Sacramento Symphony. In that instance, the symphony was incapable of offering economic terms that would have made it economically feasible for musicians who were also employed by the ballet to perform. If the terms had been accepted, it would have actually cost the musicians money to perform. Another factor that contributed to the failure to achieve an agreement is that the Sacramento Symphony had repeatedly filed for bankruptcy and the musicians believed that it ultimately would fail. (There is a now a Sacramento Philharmonic and Opera, composed of many of the same musicians, which was formed shortly after the original organization ceased operating.)

Sometimes it can take a long time before it can be determined whether or not an agreement can be reached. Local 802 recently spent six years negotiating an agreement with Neshoma Orchestra, a club date employer devoted to Jewish weddings, functions and events. At the end of the six years, a tentative agreement was reached. However, the agreement could not be ratified because its terms were unac-



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ceptable to the AFM Pension Fund. Why? Because since 2012, Neshoma had failed to pay pension contributions, and therefore the pension fund had assessed withdrawal liability against it. Without specific provisions in the collective bargaining agreement addressing and remedying the withdrawal, the agreement could not be accepted or ratified. After several attempts to remedy the situation, a binding contract could not be achieved. The result was devastating for Neshoma. The pension fund assessed a \$1.2 million withdrawal liability against the orchestra and commenced a lawsuit.

Neshoma then counter-sued Local 802 for breach of contract. Neshoma claimed that the union had promised that if it signed the contract, the pension fund would eliminate the withdrawal liability assessment. Because of this, Neshoma said that Local 802 itself should pay the company's pension liability.

But on May 23, 2018, the U.S. District Court for the Southern District of New York issued an order granting Local 802's motion to dismiss this suit, holding that no legal claims had been asserted that could be resolved in court.

(The case was *Neshoma Orchestra and Singers, Inc. v. The Associated Musicians of Greater New York, Local 802, AFM*, 2018 WL 2338764.)

According to the judge, the issues raised by Neshoma constituted issues that should have been addressed to the National Labor Relations Board three years ago.

While the result of this suit is certainly a welcome one for Local 802, it is quite unfortunate that Neshoma could not resolve its pension liability. The court granted the pension fund's motion for a judgment for the full amount of the withdrawal liability. The court ruled that since Neshoma had failed to submit a timely demand to the American Arbitration Association for arbitration, it could not challenge the assessment. The aftermath of this ruling and its ultimate impact upon Neshoma is presently unknown.

One lesson that can be learned from this situation is the importance of employers adhering to their obligation to remit pension contributions even after the expiration of their collective bargaining agreements. An employer's failure to remit timely pension contributions for a prolonged period, without making any attempt to remedy its default, could likely result in withdrawal liability. These assessments could run into the millions of dollars. Employers must be vigilant to ensure that contributions are made, or they could find themselves in the same predicament as Neshoma. This is now more important than ever, given the funding status of the pension fund.

For a link to the court's decision in the recent Neshoma case, see www.harveymarsattorney.com/wp-content/uploads/Neshoma-Decision.pdf