Bypass the AFM? Labor judges say no!

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HAVE YOU EVER performed in a concert that was live streamed to the internet? Were you paid extra for it? These kinds of contracts fall under the field of electronic media, which has long been the province of the AFM. This is as it should be. Utilization of electronic media has worldwide implications, and in order to ensure uniform terms that level the playing field, there should only be one bargaining agent that has authority to bargain. Thus, with limited exceptions, the AFM is the sole bargaining agent responsible for negotiating agreements that control the use of electronically recorded media.

There are as many electronic media agreements as there are ways of capturing performances. For instance, the AFM maintains agreements that guide the creation and sale of regular audio recordings, like CDs. Then there are agreements that cover performances transmitted over radio and TV. There is yet another agreement that permits the downloading and live streaming of performances. Finally, the AFM negotiates with a consortium of symphony orchestras for the **Integrated Media Agreement**, a contract that creates a virtual smorgasbord of options through which symphony orchestras can exploit recorded performances. The IMA is an extremely versatile agreement that takes into account the ever-changing terrain of the recording and reproduction of music.

Nevertheless, as versatile and flexible as the IMA is, sometimes orchestra managements try to bypass the agreement. Competition for recording projects can lead to a break in solidarity among orchestras who are signatories to AFM collective bargaining agreements. This has the potential of leading orchestral musicians into a race to the bottom, which is antithetical to the very reason why the AFM serves as the bargaining agent in the first place. The desire of employers to negotiate individual media agreements has led to some provocative litigation that has ultimately solidified the AFM's role as exclusive bargaining agent for electronic media usage.

One of the first occasions where the NLRB was called upon to examine the AFM's role as bargaining agent for electronic media was prompted when the management of the Cleveland Orchestra decided that it no longer wanted to negotiate with the AFM over live recordings and internet broadcasts. While management had been a longstanding signatory to various AFM recording agreements, in 2009 it decided that it would only negotiate electronic media usage terms directly with AFM Local 4, the union signatory to its collective bargaining agreement. For this reason, it disassociated itself from the multiemployer group that negotiated electronic media terms with the AFM and demanded direct bargaining with Local 4.

In *Musical Arts Association vs. The AFM, 356 NLRB 1470 (2011)*, the NLRB declared that orchestra management had committed an unfair labor practice by refusing to bargain with the AFM over electronic media, as it had done for so many years. Critical to this determination was the fact that management had previously recognized the AFM as electronic media bargaining agent and was not able to overcome the legal presumption that the AFM still enjoyed majority status among orchestra members. In coming to this conclusion, the labor board affirmed its precedent that a local and its parent organization can in fact be joint collective bargaining representatives. The U.S. Court of Appeals for the D.C. Circuit enforced the board's determination and held that "two or more unions may serve as joint collective-bargaining representatives for a single unit of employees." Thus an employer may have a dual bargaining obligation both to a local union as well as its corresponding parent organization. The Cleveland Orchestra management was ordered to bargain with the AFM.

The Cleveland decision was critical to a February 2017 determination made by NLRB Administrative Law Judge Geoffrey Carter that held that the Colorado Symphony Association had committed an unfair labor practice by negotiating directly with the orchestra's players' committee rather than with the AFM. The case is *Colorado Symphony Association vs. AFM, 2017 WL 605058 (2017)*. There, the symphony management had implemented terms that it had negotiated directly with the orchestra's musicians, asserting that an impasse had existed in its negotiations with the AFM. The impasse, it contended, justified implementation. As a fallback position, management argued that it did not have a bargaining obligation with the AFM, and therefore was not required to bargain with the AFM.

The judge rejected the latter argument based upon the fact that management had already commenced bargaining with the AFM over electronic media. Those negotiations were stymied from continuing because of outstanding information requests that management had refused to respond to, as well as the fact that the AFM was waiting for the outcome of its negotiations over the terms of a successor Integrated Media Agreement. The judge declared that a lawful impasse did *not* exist because management had unjustifiably refused to supply information concerning upcoming recording projects to the AFM. Such information was essential to bargaining. Implementation of the agreement was deemed illegal.

Presently, the Colorado Symphony management has been ordered to restore the status quo and pay musicians what they should have been paid for recording projects that were instead performed under the implemented agreement. Furthermore, management was ordered to bargain with the AFM for the terms of the media portion of its collective bargaining agreement. The outcome of the renewed negotiations will be interesting to observe.

It is clear that both NLRB decisions have solidified the AFM's role as sole bargaining agent for electronic media terms. These legal precedents do much to ensure that uniform media provisions will persist. These will prevent orchestras from seeking to outbid each other for recording projects – an event that we all must recognize is contrary the fundamental tenets of unionism.