

## 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.

**I T APPEARS THAT** the days of "play while negotiating" are over for orchestral players throughout the United States. One only has to look to Minnesota and Indianapolis to see that a new paradigm for orchestral negotiations has emerged. Presently, orchestral management will unflinchingly lock musicians out if they do not accede to their often unreasonable bargaining demands.

While lockouts were once relatively uncommon occurrences, in the last two years they have become a weapon of choice for aggressive employers who wish to extract concessions from their employees. To some extent these employers have been successful.

In order to end a month-long lockout, the Atlanta Symphony's musicians recently accepted a two-year contract that contained over \$5 million of concessions. To me, such a concessionary contract will only embolden other orchestra managements to engage in similar tactics.

So how can this tide be turned?

One way is for musicians to understand that being locked out may actually be an advantage and may place them in a better strategic position than a strike. To that end, let's review how lockouts may vary from strikes.

Very generally, a lockout is usually initiated by an employer, while a strike is usually initiated by workers.

In a lockout, the employer is preventing workers from coming to work and doing their jobs. In a musical setting, this may mean that orchestra management cancels a concert – or an entire season – even though



Musicians from the Detroit Symphony Orchestra performed on their picket line in 2010.

PHOTO: HART HOLLMAN

**Orchestral musicians face tough times when negotiating new contracts. *It takes nerves of steel and good strategies.* Here's a legal question that may help...**

# Are lockouts better than strikes?

musicians are ready and willing to work.

On the other hand, a strike means that workers refuse to work and usually set up a picket line.

Strikes and lockouts usually occur during contract negotiations, after the current contract has expired. In fact, many contracts have a "no strike/no lockout" clause, so that while the contract is in effect, the management can't lock out the workers, and the workers agree not to strike.

Let's set up a scene where a strike or lockout happens. First, imagine an orchestra that has a collective bargaining agreement with Local 802. The agreement expires. What happens next?

There is a paperwork hurdle that must occur first, and without it, any strike or lockout is illegal. The party who wants to negotiate a new contract (usually the union) must first file a proper notice under section 8(d) of the National Labor Relations Act.

This section of the NLRA provides that if a collective bargaining agreement is in effect, the party who wishes to modify or terminate it must notify the other party 60 days prior to the contract's termination date and must notify the Federal Mediation and Conciliation Service 30 days after the first notice is sent. Also, the initiating party must refrain from a strike or lockout for 60 days after the first notice is given.

Failure to provide such notice within the required time frames may lead to disastrous results if a strike or lockout is employed. In the case of an illegal lockout, the NLRB would order the violating employer to reinstate its locked out employees and pay them for all lost wages. Hence, if management declares a lockout it always pays to check with the National Mediation and Conciliation Service to ascertain whether they had received a timely 8(d) notice, if the employer was the party initiating the negotiations.

The first major variance between a strike and a lockout is that locked-out employees cannot be permanently replaced, whereas striking employees may be. While an employer may continue its operations during a lockout using temporary employees (scabs), it cannot fire its regular employees. Even the threat of permanently replacing employees is an unfair labor practice. *Ancor Concepts*, 323 NLRB 742 (1977). Once the lockout ends, employees are assured that they will get their jobs back.

The same is not true for an economic strike, where the employer has the option of terminating striking employees.

For a symphonic orchestra, this is a major distinction. During a strike, orchestra

management may hire new permanent musicians to perform. During a lockout, orchestra management will have little chance of obtaining high-quality temporary replacements. An orchestra lockout effectively means no performances, hence no revenue and refunded ticket sales. An orchestra that locks out its musicians has more to lose than one that is struck.

Furthermore, while in many states striking employees are not entitled to unemployment benefits, they may be entitled to benefits if they are locked out. (Note that in New York, employees are entitled to unemployment benefits regardless of whether they struck or were locked out.)

Additionally, recent NLRB precedent favors locked-out employees. An August 2012 decision of the NLRB has held that an employer's lockout may be deemed illegal if unfair labor practices are committed by the employer even after the lockout. *Dresser-Rand Company* 358 NLRB No. 97 (2012).

In this case, the employer had improperly terminated several locked-out employees and failed to give employees vacation time they were entitled to receive after they returned to work.

This labor board decision raises the stakes for employers who chose to lock out their employees. While an employer's decision to lock out workers may at first be legally proper, it may ultimately be held unlawful. The potential liability that could now be imposed upon an employer who locks out its employees may supply considerably more leverage than a strike does.

Finally, as a general rule the public is more sympathetic to locked out employees. Often, the negative publicity caused by a lockout, especially where the public is being turned away from performances they had already paid to hear, may turn the tide in the orchestra's favor.

These are extremely difficult times for orchestral musicians throughout the United States. For those who are locked out, the best result may be achievable simply by weathering the storm.

P.S. As Allegro went to press, I received notification that the Indianapolis lockout had ended and that negotiations were successfully completed. The conclusion of the lockout can be attributed in no small part to the resolve of orchestral musicians throughout the country coming to their colleagues' aid with financial support. Such action permitted these musicians to hold fast, proof that staying the course and preserving through a lockout will often lead to a more positive result.

# Why record music for film in New York?

## Myths vs. facts...

**IT IS A** well-known fact that New York City is one of the most creative and diverse musical environments in the world. Local 802's great musicians – from the fields of Broadway, symphonic, jazz, urban, hip-hop, folk, country, rock, pop, experimental and world music – comprise a pool of talent second to none.

Combine all this musical talent with a cash-in-your-pocket New York State rebate for qualified post-production expenses – including film scoring – and New York shines as a very cost-effective place to record the highest quality music for film. (For more details, see our previous article in the October issue of Allegro. You can read it at [www.bit.ly/AllegroArchives](http://www.bit.ly/AllegroArchives).)

Yet myths persist that there are so-called “reasons” not to record in New York under AFM contracts. Here are a few facts that can disperse the fog of wrong ideas:

**MYTH:** It is too expensive to use AFM contracts.

**FACT:** There are actually many contracts available for producers to choose from. Some offer tiered costs, based in part on a project's budget. These include the Low Budget Motion Picture contract and Indie/Festival Film contract. Specific contracts and rates are easily available by e-mailing Local 802's Electronic Media Supervisor Steve Danenberg at [Sdanenberg@Local802afm.org](mailto:Sdanenberg@Local802afm.org). The information is also available on a brand-new site: [www.AFMrecording.org](http://www.AFMrecording.org). (The site is still under construction, but the right-hand sidebar contains active links to the various contracts and rates.)

Another fact to remember is that the New York State tax credits provide a 30 percent cash refund for qualified expenses. See [www.NYlovesFilm.com](http://www.NYlovesFilm.com).

**MYTH:** AFM contracts require complex and costly residual payments to musicians.

**FACT:** Under AFM contracts, the rate for residual payments is approximately 1.2 percent. (This rate is computed on distributors' gross income received in secondary markets like DVD sales, etc.). That is as little as one-third of the residual rate paid other union workers. When working

in film and TV, producers hire IATSE camera operators, SAG actors, WGA writers and other union workers. Some of those unions have residual rates as high as 3.6 percent. We are inexpensive by comparison. For more information on residuals for musicians, see [www.fmsmf.org](http://www.fmsmf.org).

When confronted with these facts about how low our residual rate really is, many producers have proceeded to work under AFM contracts.

**MYTH:** Recording work is dead in New York.

**FACT:** Theatrical film recording has increased over 100 percent in the last two years. It is reasonable to project that the increase of the state post-production tax credits will continue to support an increase in film scoring and recording in New York.

**MYTH:** There is nothing we can do to revive our industry.

**FACT:** The AFM, in conjunction with the RMA, has initiated a number of actions that constructively challenge and engage producers who resist using AFM contracts, as well as producers who are signatories and have not been complying with the terms of the contracts.

Soliciting and integrating input from rank-and-file musicians has been a priority in recent union negotiations. These include the SRLA and the TV/Live Videotape contract talks, and will continue with the upcoming Theatrical Film contract negotiations.

We'll leave you with one final **FACT:** It is cost-effective, convenient and exciting to record music in New York!

– Shem Guibbory for the RMA-NY Board

  
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