

SHARING THE PIE

How a new approach to bargaining could save more orchestras

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.

WITH THE CONSTANT barrage of concessionary bargaining in the orchestral field these days, I think that we all yearn for a more enlightened approach; one that balances management's need for fiscal solvency and responsibility with orchestra members' desire to perform with an artistically excellent professional ensemble. It appears that the common theme we all hear nowadays is that professional orchestras' financial resources are being depleted faster than revenue can be generated and thus musicians, who are the very product these organizations rely upon, must be satisfied with less and less of a share of the fiscal pie. In fact, if we each had a dollar for every time an orchestra management relied upon the "pie" analogy to describe their economic plight we collectively would have enough funds to cure each and every orchestra's fiscal deficit from now to the end of time. Funny enough, during one negotiation I was involved in, a bargaining unit

member tired of hearing management drone on and on about the decreasing volume of its pie blurted out, "Stop taking about your small *pie* and find a way to increase its *dough*!" Therein lie the dilemma and the seeds of its solution. A new paradigm of bargaining must be employed if we are truly going to solve the problem of the shrinking pie.

Traditional bargaining is known as distributive bargaining. Essentially, distributive bargaining's premise is that there is a fixed resource that must be allocated among the parties and the process by which the resource is doled out is dependent upon the relative bargaining strength of the parties. The stronger your relative bargaining power is, the greater the likelihood you will receive a larger slice of pie. In order to demonstrate bargaining power, labor and management rely upon economic weapons such as the strike and lockout. The most recent example of distributive bargaining and the use of economic sanctions is the Metropolitan Opera Orchestra negotiations. There, the Met's management attempted to extract concessions by means of a lockout threat. Concessions were allegedly required because the Met's resources were being exhausted and needed to be reallocated. As we all know, distributive bargaining can often be destructive and adversarial. That negotiation was no exception.

However, distributive bargaining is not the only approach nor is it the best approach even when resources are constrained. Recently, I attended a training offered by the Federal Mediation and Conciliation Service that explored an alternative approach to bargaining, one that is not by any means new, but one that is underutilized and underestimated. This approach is known as **integrative bargaining** or **interest-based bargaining**. Integrative bargaining is the process by which the parties to a collective bargaining negotiation

seek to integrate their mutual interests as effectively as possible. In integrative bargaining, both parties begin the negotiation in the spirit of cooperation and collaboration and seek to identify options to essentially "expand the pie" so that resources can be increased for both. However, integrative bargaining is more than just labor and management being cordial and polite with one another. While that certainly helps, this form of bargaining is considerably more than everyone just holding hands and singing "Kumbaya." It requires open and active participation by both parties to identify mutual interests. To succeed, both parties must be willing to share information liberally and engage in a process known as active listening. Active listening is an approach by which each party seeks to fully understand and empathize with the other's position and needs without imposing judgment on the position asserted. Once that process is completed, both parties should be in a better position to work together to achieve the mutual interests they have identified.

A recent negotiation I was involved in demonstrates the possible results of integrative bargaining. There, the symphony had lost a considerable public grant and could no longer afford a fixed number of services per season. Prior to my involvement, the parties were at loggerheads and it seemed as though the organization would not

survive. However, once we identified the parties' mutual interest in raising revenue, we developed contractual language through which a joint labor-management fundraising committee was formed that would report monthly to the orchestra's board of directors. In exchange for the partnering between labor and management to acquire revenue, the orchestra agreed to a fixed number of performances as a goal. A key to this negotiation was the understanding that there was a fiscal crisis, but one that did not require the orchestra to abandon fixed services.

The result of the Met negotiation can also be viewed as a result of mutual gains bargaining. While the negotiation started as a textbook example of distributive bargaining, at its conclusion it evolved into a more integrative approach. Both parties shared information with a third party who assisted them in achieving a more sound fiscal approach to Met productions. Through this approach, any concessions the musicians agreed to might be reversed. This certainly is a better approach than a lockout threat.

While integrative bargaining is by no means a panacea, it certainly is worth employing when parties are hopelessly deadlocked and are staring down the horrific consequences of a strike or lockout. It is definitely a more sane approach to labor-management relations, and, these days, who couldn't benefit from a little dose of sanity!

