

# When the gender pay gap affects musicians...

Two recent cases involve disparities between pay for men and women – even under a union contract

## LEGAL CORNER

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**U**NDER A UNION CONTRACT, every musician is guaranteed at least a minimum scale. However, employers are always free to pay musicians more than scale. But who gets overscale? And what if more male musicians are awarded overscale than women? That's the topic of this month's column, and it starts with something that may seem rather dry, but is actually quite powerful: the **information request**.

Information requests are one of the most useful tools available to a union during bargaining or grievance processing. An employer (or a union, for that matter) is statutorily obligated under Section 8 of the National Labor Relations Act to respond to properly formed requests that seek information

pertaining to bargaining demands or grievance adjustment. According to the National Labor Relations Board, an information demand is presumptively relevant if it requests information that will assist in forming or responding to bargaining demands or preparing and pursuing grievances. (Source: *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 156 [1956].) In the Truitt case, the NLRB held that an employer's obligation to bargain in good faith includes the duty to furnish relevant information upon request. To rebut the presumption of relevance, the party against whom the request is made is required to demonstrate either that the information sought had no bearing upon the grievance or negotiation at issue or that confidentiality or proprietary interests outweigh the requesting party's right to obtain the information.

Recently, the NLRB rendered a decision that substantially expands the scope of information that a union can request from a symphony orchestra to assist it in the eradication of impermissible gender-based wage discrimination. The case was *Colorado Symphony Association and Denver Musicians Association, Local 20-623*, 366 NLRB No 60 (April 13, 2018).

Here, the NLRB held that the Colorado Symphony was obligated to respond to the union's information request seeking a basic fact: who was getting paid overscale? The request was for copies of all orchestra members' overscale contracts to ascertain whether there were any gender-based pay disparities. The information request came on the heels of an Equal Employment Opportunity Commission investigation initiated by the symphony's principal flutist, who alleged

in the charge that she was subjected to illegal gender-based pay discrimination.

In opposition to the request, the Colorado Symphony asserted that the information request was submitted by the union for the improper purpose of assisting with the private litigation of the Equal Pay Act claim.

In rejecting this assertion, the NLRB stated that "it is well established that investigating possible employer race or sex discrimination is a legitimate purpose related to a union's collective bargaining duties and responsibilities." The fact that the information might also buttress the principal flutist's EEOC claim was irrelevant. The labor board noted that "if information is relevant to collective bargaining, it loses neither its relevance nor its availability merely because a union additionally might or intends to use it to attempt to enforce statutory and contractual rights before an arbitrator, the Board or the Court." The fact that the union did not specify the exact use it had for the requested information was deemed irrelevant to the inquiry.

In a rather ironic twist, the Boston Symphony Orchestra was sued in June, also by its principal flutist, because allegedly there was a \$70,000 pay disparity between her salary and the salary paid to the BSO's principal oboist, a male. The suit was initiated in Massachusetts Civil Court under recently enacted amendments to the Massachusetts Equal Pay Act, which became effective as of July 1. In addition to the equal pay claim, the plaintiff has asserted that she was subjected to illegal retaliation because she had sought an internal remedy to the alleged pay disparity. According to the complaint, the BSO had retracted the plaintiff's participation in a

documentary on the impact of gender on blind auditions allegedly out of fear that she would during an interview for the film disclose the discriminatory treatment she believed that she had been subjected to. An information demand requesting all overscale contracts in accordance with the Colorado Symphony decision might be useful to advance the claims asserted in that litigation.

While litigation is never a welcome event in the course of orchestral operations, hopefully these two matters will ultimately promote pay equality and protect union members from gender-based pay inequity. The NLRB's Colorado Symphony decision is a welcome addition to the tools a union has at its disposal to combat illegal wage disparity. These days when there is a dearth of positive news concerning the American labor movement, this is a welcome event.

## Hank Lane settlement

Local 802 and the Hank Lane club date office have reached a settlement, right on the heels of the new Local 802 club date agreement. The settlement finally addresses an apparent non-union operation, the Henry Marks Agency, which was related to the Hank Lane office. Part of the settlement is the inclusion of five non-union club date bands into the Hank Lane bargaining unit, which will now be covered by the Local 802 master club date contract. The settlement also places a permanent moratorium on the addition of new non-union club date bands to the Henry Marks Agency, which is now being merged into Hank Lane. This is a significant win for Local 802 club date musicians.