



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Orchestra Can't Revive Pension Liability Dispute With Union

By **Danielle Nichole Smith**

Law360 (September 3, 2020, 9:13 PM EDT) -- The Second Circuit on Thursday left a Jewish orchestra on the hook for a \$1.1 million withdrawal liability, finding that its allegations that a union tricked it into signing a collective bargaining agreement by promising to nix the penalty were trumped by federal labor law.

In its opinion, the three-judge panel affirmed the district court's finding that the National Labor Relations Act preempted claims Neshoma Orchestra and Singers Inc. brought against the Associated Musicians of Greater New York Local 802 in a third-party complaint.

"The district court lacked subject matter jurisdiction over Neshoma's claim, which grew out of an allegedly bad-faith promise made during collective bargaining," the panel said. "The NLRA gives the [National Labor Relations Board] exclusive jurisdiction over such a claim."

Nor was the panel persuaded by Neshoma's arguments that it properly initiated an arbitration over the withdrawal liability or that the American Arbitration Association's rules were unfair.

The orchestra had argued that a letter it sent in August 2015 triggered the arbitration demand within the deadlines established by the Employee Retirement Income Security Act. But the panel noted the pension fund's rules required that arbitration demands be made with the AAA.

"If an employer has committed by contract to use a certain procedure to initiate arbitration, then it must follow that procedure or suffer the consequences," the panel said.

Neshoma's contention that the AAA's \$8,200 filing fee was unfair was also unavailing, the panel found, saying the lower court rightly found that it didn't excuse the orchestra from timely filing an arbitration demand with whatever portion of the fee it could afford.

The orchestra lodged its third-party complaint against the Associated Musicians of Greater New York Local 802 in June 2017 amid its dispute with the American Federation of Musicians and Employers' Pension Fund and its trustees over the \$1.1 million liability.

The orchestra claimed that the fund assessed the withdrawal liability in 2015 at the demand of the Associated Musicians of Greater New York Local 802, which wanted to put pressure on Neshoma during labor negotiations.

When the parties eventually reached an agreement, the union promised that the fund would take back the assessment if Neshoma signed, according to the third-party complaint. Yet the fund has continued to press for the withdrawal liability, the orchestra said.

However, the district court dismissed the orchestra's claims in May 2018, finding that they were based on bad-faith negotiation allegations and preempted by the NLRA.

After the judge **later held** in April 2019 that Neshoma owed the fund more than \$1.1 million in withdrawal liability and more than \$500,000 between interest and damages, the orchestra appealed to the Second Circuit, challenging both the liability and the dismissal of its claims.

Neshoma told the appeals court that the fund shouldn't have been awarded summary judgment on the withdrawal liability because the orchestra adequately demanded an ERISA arbitration over the assessment.

The fund had been allowed to place "unconscionable barriers in the arbitration process and then sidestep the arbitration forum based upon an employer's inability to comply with these unconscionable barriers," the orchestra said. According to Neshoma, the orchestra was required to pay roughly \$8,200 upfront for arbitration while the fund had to pay nothing.

The orchestra further argued that the lower court wrongly found its claims against the union to be preempted by the NLRA when the Second Circuit held that courts had the authority to "ascertain the existence of contracts, separate and apart from collective bargaining agreements, between employers and unions."

However, the union told the appeals court that none of the events that led to the \$1.1 million withdrawal liability being assessed against Neshoma Orchestra and Singers Inc. were its fault.

And even if the union had lied and told Neshoma that it would make the liability go away if the orchestra signed a successor collective bargaining agreement — as Neshoma has contended — that lie didn't create the liability and damages the orchestra is facing, the union contended.

The pension fund and its trustees also filed a brief at the Second Circuit contesting Neshoma's appeal, saying the lower court hadn't erred in finding that Neshoma didn't initiate arbitration in time. The orchestra didn't try to file for arbitration until two months after the deadline, the fund said.

Ira A. Sturm, an attorney for the orchestra, told Law360 in a statement Thursday that it's "unfortunate that in its decision the court has legislated new provisions into the ERISA laws and its regulations that simply do not exist."

"This decision should serve as a wake-up call to other employers to not trust union promises during negotiations as the court has given them license to lie with impunity," Sturm said.

But Patricia McConnell, an attorney for the pension fund, said in a statement to Law360 on Thursday that the decision "reaffirms that, in initiating arbitration of a withdrawal liability assessment, an employer is required to follow the pension fund's rules for the initiation of arbitration and must strictly adhere to the time limits of 29 U.S.C. §1401 (a)(1)."

Harvey S. Mars, an attorney for the union, told Law360 in a statement Friday that the union "applauds the Second Circuit's affirmance" of the district judge's "well-reasoned decision."

"It is our hope that Neshoma will now promptly honor its obligation to remit withdrawal liability payments to the pension fund for the benefit of the many musicians it employs who have vested a pension," Mars said.

Counsel for the union didn't respond Thursday to a request for comment.

U.S. Circuit Judges Ralph K. Winter, John M. Walker Jr. and Susan L. Carney sat on the panel for the Second Circuit.

Neshoma is represented by Ira A. Sturm of Raab Sturm & Ganchrow LLP.

The fund and its trustees are represented by Patricia McConnell of Meyer Suozzi English & Klein PC.

The union is represented by Harvey S. Mars of the Law Office of Harvey S. Mars LLC.

The case is Neshoma Orchestra and Singers v. American Federation of Music, case number 19-1093, in the U.S. Appeals Court for the Second Circuit.

--Editing by Haylee Pearl.

Update: This story has been updated to include comment from the union's counsel.

All Content © 2003-2020, Portfolio Media, Inc.