

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 8**

**THE MUSICAL ARTS ASSOCIATION**

**and**

**CASE NO. 8-CA-38834**

**AMERICAN FEDERATION OF MUSICIANS  
OF THE UNITED STATES AND CANADA, AFL-CIO**

**ANSWERING BRIEF OF COUNSEL FOR  
THE GENERAL COUNSEL**

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This matter comes before the Board as a result of the decision issued by Administrative Law Judge Eric M. Fine on January 13, 2011. The Respondent has filed exceptions to portions of this decision, including Judge Fine’s finding that Respondent violated Section 8(a)(1) and (5) of the Act by failing to recognize and bargain with the American Federation of Musicians (AFM) as the joint exclusive bargaining representative of the musicians of The Cleveland Orchestra with regard to certain media matters. Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel submits this Answering Brief in response to Respondent’s exceptions and argues that the record evidence and cited case law fully support Judge Fine’s analysis and conclusions.

**I. The Parties’ Relationship**

The Respondent operates The Cleveland Orchestra, which employs approximately 100 musicians. (Tr. 275)<sup>1</sup>. Judge Fine correctly found that the Respondent, AFM, and Cleveland Federation of Musicians, Local 4 (Local 4) have been party to a joint bargaining relationship and, pursuant to this relationship, the Respondent has recognized Local 4 and the AFM, the international union with which Local 4 is affiliated, as the joint bargaining representatives of the musicians with each union assuming a specific area of bargaining responsibility. (JD, p.23, Lines 4-5). As Judge Fine found, Local 4 has authority to bargain over matters relating to live performances, rehearsals for those performances, and local television and radio broadcasts, and the AFM has authority to bargain over the terms and conditions of employment pertaining to certain media issues. (JD, p. 26, Lines 39-45).

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<sup>1</sup> “Tr” will be used herein to refer to the transcript, “GC” will be used to refer to General Counsel’s exhibits, “R” will be used to refer to Respondent’s exhibits, “Jt. Stip.” will be used to refer to Joint Stipulations, “Jt. Ex.” will be used to refer to Joint Exhibits, and “JD” will be used to refer to the Administrative Law Judge’s Decision.

**II. Judge Fine correctly found that a pattern of bargaining exists between the parties whereby the Respondent has recognized the AFM as the joint bargaining representative of the musicians playing in The Cleveland Orchestra.**

Judge Fine correctly applied Vermont Marble Co. & White Pigment Corp., 301 NLRB 103 (1991) and Tree-Free Fiber Co., 328 NLRB 398 (1999) to this case. The cases establish that, in determining whether an employer has voluntarily recognized a union as the bargaining representative of its employees, the Board looks largely at the contractual and bargaining history between the parties. Vermont Marble Co., 301 NLRB 103, 106 (1991); Tree-Free Fiber Co., 328 NLRB 389, 398 (1999). Further, contrary to Respondent's exceptions, the rule that an Employer has only a six month window to challenge the representational status of a union if it believes the union lacked majority status at the time of recognition is relevant to this case, as the Respondent recognized the AFM's representational status outside this time period. Local Lodge No. 1424 (Bryan Mgf.), 362 U.S. 411, 419-28 (1960).

**A. Contractual History**

For almost thirty years, the Respondent has been signatory to a media agreement with the AFM. (Jt. Stip. 2). Specifically, the Respondent has been signatory to the Symphony, Opera or Ballet Orchestra Audio-Visual Agreement (AV Agreement), the Symphony, Opera or Ballet Orchestra Internet Agreement (Internet Agreement) and the Symphony, Opera or Ballet Orchestra Live Recording Agreement (Live Recording Agreement). (Jt. Stips. 2, 3, 8 & 10). While each of these agreements has expired, the Respondent has continued to pay its musicians pursuant to the agreements when performing works falling under their terms. (Jt. Stip. 27). Taken together, the agreements demonstrate that the Respondent has recognized the AFM as the

bargaining representative for the musicians in regards to the wide array of electronic media projects the Respondent pursues.

### ***1. The AV Agreement***

The AV Agreement covers the exploitation of electronic media where both the audio and a visual of the performance are displayed together. (Tr. 54) The Respondent was signatory to the original AV Agreement that was effective from January 1, 1982 through July 31, 1984 and was signatory to each of the successor AV Agreements including the most recent agreement that was effective from February 1, 2006 through January 31, 2008. (Jt. Stips. 2, 3, & 4). The most recent AV Agreement contained the following recognition language: “The Employer hereby recognizes the Federation as the exclusive bargaining representative of persons employed as musicians who are employed by the Employer in audio-visual activities covered by this Agreement.” (Jt. Ex. 1, p. 3). The parties to the AV Agreement were the AFM and a signatory Symphony, Opera or Ballet Institution. (Jt. Ex. 1, p. 1). Local 4 was not party to this agreement.

### ***2. The Internet Agreement***

The Internet Agreement covers the exploitation of digital, audio media available for purchase on the Internet where no physical copy is available for purchase. (Tr. 63-64). The Respondent was one of the original signatories to the Internet Agreement and was part of the employer group that agreed to extend the agreement through March 31, 2005. (Jt. Stip. 8; Jt. Ex. 4). The record evidence makes its clear that the signatory employers recognized the AFM’s authority to bargain over the digital media covered by the agreement, thus supporting Judge Fine’s finding that the agreement was part of a pattern of bargaining whereby orchestras bargained with the AFM on a national level regarding certain electronic media.

An Electronic Media Forum, made up of employer representatives, rank and file musicians and representatives from the AFM, formed to negotiate the terms of the agreement. (Tr. 66). On June 29, 2002, Joe Kluger, the then Chair of the Managers' Media Committee<sup>2</sup> and a participant on the Electronic Media Forum, sent a letter to industry employers recommending they vote to approve the agreement. (Jt. Ex. 16). In this letter, Kluger described the Internet Agreement as supplementing but not replacing "existing AFM electronic media agreements." (Jt. Ex. 16). The letter goes on to explain that the Internet Agreement contained some "nationally-mandated conditions and parameters. . . ." (Jt. Ex. 16). In recommending the agreement to other employers, Kluger made no suggestion that the agreement was any other than an agreement with the AFM.

The Internet Agreement is signed by Kluger as Chairman of the Managers' Media Committee and Steve Young, the President of the AFM. (Jt. Ex. 2). The extensions are signed by individuals holding these same positions. (Jt. Exs. 3 & 4). No representatives of local unions signed the Internet Agreement.

While the Respondent argues that the Internet Agreement was experimental and, thus, not intended to be precedent setting, the agreement states at page 2 that "[u]pon expiration of the Agreement, unless the parties agree to an extension or enter into a new Agreement, the Employer may no longer engage in Internet Use or Internet Recording." (Jt. Ex. 2). Further, the Respondent's actions since the expiration of the Internet Agreement demonstrate recognition that it has an on-going duty to bargain with the AFM over the media covered by the Internet Agreement. The Respondent was party to the multi-employer bargaining with the AFM that occurred from November 2007 until May 9, 2009. This bargaining developed into an attempt to

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<sup>2</sup> The Managers' Media Committee is a committee of industry managers who meet to discuss media matters (Tr. 252). The employers' participating in the most recent round of multi-employer bargaining with the AFM bargained through the Managers' Media Committee. (Jt. Ex. 21, Jt. Stip. 14).

negotiate a comprehensive media agreement that would replace the AV Agreement, Internet Agreement, and Live Recording Agreement. (Jt. Stip. 13). Gary Hanson, Respondent's Executive Director, served as Chairman of the multi-employer bargaining group during these negotiations. He testified that topics formerly covered by the Internet Agreement were bargained over during the most recent multi-employer negotiations. (Jt. Stips. 14 & 15; Tr. 291).

### ***3. The Live Recording Agreement***

The Live Recording Agreement covers the production of hard copies, such as compact discs, of recordings of live performances. The Live Recording Agreement also covers digital downloads of live performances when the performance is also available in a hard copy form. (Tr. 58, 63). The Respondent became signatory to the Live Recording Agreement on January 27, 2007. (Jt. Ex. 17). The Live Recording Agreement contains the following recognition clause: "The Employer recognizes the Federation as the exclusive bargaining representative of Musicians who are employed by the Employers in the creation of live audio recording products covered by this Agreement for the purpose of establishing wages, terms and conditions applicable to the creation of those live audio recording products." (Jt. Ex. 5, p. 1). The parties to the Agreement were the AFM and a signatory employer. (Jt. Ex. 5, p. 1-2). Local 4 was not a party to this agreement.

Citing the Memorandum of Agreement marked as Joint Exhibit 21, Respondent argues that it entered into the Live Recording Agreement pursuant to an agreement with Local 4. However, the evidence demonstrates that the Memorandum of Agreement at the local level simply represents the parties putting into effect the terms of the Live Recording Agreement. The Live Recording Agreement contains provisions for local musicians to approve the projects they complete under the Agreement. (Jt. Ex. 5, p.2) Hanson testified that the Memorandum of

Agreement was an agreement to perform nine projects under the Live Recording Agreement. (Tr. 292). While it is true that Local 4's President signed the Memorandum of Agreement, Hanson's Memorandum dated October 24, 2006 regarding the agreement to produce projects under the Live Recording Agreement does not mention the necessity of the Local's approval of the projects. Rather, consistent with the Live Recording Agreement, Hanson wrote that the agreement was that the "Orchestra will vote on, the release of up to nine CD's to be produced from live concerts. . . ." (G.C. 10). It is clear that Joint Exhibit 21 represents the Respondent and the local musicians complying with the project-by-project approval process set forth in the Live Recording Agreement. Further, there is no dispute that Respondent became signatory to the Live Recording Agreement. (Jt. Ex. 17).

Hanson testified that he did not believe the Respondent had any on-going obligations under the Live Recording Agreement once it expired. (Tr. 259). However, the Respondent's actions belie this position. Hanson testified that the Respondent still follows the expired agreement. (Tr. 257). Further, in February 2010, the Respondent notified the musicians that they would be paid for recent projects pursuant to the agreement. (Jt. Stip. 27, Jt. Ex.18) Finally, the terms of a successor to the Live Recording Agreement were bargained over during the most recent round of multi-employer negotiations that the Respondent took part in. (Jt. Stip. 13, Tr. 292).

## **B. Bargaining History**

The record fully supports Judge Fine's finding that the parties have developed a bargaining pattern where there is a bifurcation of areas of negotiation.

William Foster serves as the Chair of the Electronic Media Committee for the International Conference of Symphony and Opera Musicians (ICSOM), an AFM conference

made up of the fifty orchestras in the United States with the largest budgets. (Tr. 44-45). In his position as Chairman and as a member of the Electronic Media Committee, he has served on the AFM's bargaining committee in negotiations regarding electronic media and helped negotiate the AV Agreement, the Internet Agreement and the Live Recording Agreement. He took part in the most recent multi-employer negotiations for a successor to all three of these agreements. (Tr. 45-47). Foster testified that a division of representation between the AFM and its affiliated locals exists whereby musicians are represented by their local union for live performances and the preparation for those performances and are represented by the AFM when they are "performing electronic media or if electronic media is being produced from the live services that are covered by their Local Agreement. . . ." (Tr. 48-49).

Local 4 President Leonard DiCosimo corroborated Foster's testimony regarding the division of representation between the AFM and its affiliated locals. He testified that Local 4 handled matters covered by the local agreement and the AFM handled "all of the working and economic conditions that are in the, what we call the Media Agreements." (Tr. 125). DiCosimo went on to identify the media agreements as including the AV Agreement, Internet Agreement and Live Recording Agreement. (Tr. 125-26, 133).

As Judge Fine noted, the Local collective bargaining agreement covering the period from September 1967 to September 1970 references this division, providing evidence that the representational division long predates the media agreements presented in this matter. (JD, p. 17, Lines 34-39). Specifically, the agreement states that "[t]he rules and regulations of the American Federation of Musicians pertaining to recording will be applicable to all commercial recordings." (R. 3, p. 25). At Article 13, Section 4, the current local agreement contains the same language as the 1967 agreement. (Jt. Ex. 6, p. 45).

Further, the AFM agreements assume that there is a local contract covering the musicians engaged in producing electronic media. First, the AFM media agreements are available only to employers that are party to a collective bargaining agreement with a local union. (Tr. 60, Jt. Exs. 1, 2 & 5).

Second, the grievance arbitration provisions in each AFM media agreement are applicable only to disputes arising from those specific agreements. (Jt. Ex. 1, p. 44; Jt. Ex. 2, p. 10; Jt. Ex. 5, p. 10). It is the AFM, and not the local unions, that files grievances under the media agreements. (Tr. 67). The Local collective bargaining agreement contains a separate grievance arbitration procedure for disputes arising out of that specific agreement. (Jt. Ex. 6, pp. 54-55).

The above contract provisions demonstrate that the AFM agreements are intended to dovetail with the local agreement(s) by covering areas of working conditions not covered by the latter. The contracts at the national and local level work together to provide comprehensive representation of the musicians, with the AFM and Local 4 acting as joint representative of the musicians of The Cleveland Orchestra with authority in separate distinct areas. Respondent's assertion that no "workable pattern of bargaining" exists between the parties is directly contradicted by the contractual and bargaining history between the parties.

Respondent argues that the Local collective bargaining agreement's limited media provisions substantiate its claims that Local 4 is the musicians' exclusive bargaining representative for all media related topics. However, Judge Fine aptly noted that the parties have a thorough understanding of the parameters of the Local versus national agreements. (JD, p. 24, Lines 19-25) The record evidence firmly supports Judge Fine's finding that, in terms of commercial work, the parties understand the Local agreement's media provisions to apply to

local radio broadcasts and the distribution of those local broadcasts on the Internet. (Tr. 135, 149, 353-54).

To buttress its argument that the Local agreement's media provisions are more expansive than the evidence supports, the Respondent cites to the *Rusalka* project. However, Gary Giestling, Respondent's General Manager, testified that, when the Salzburg Festival approached the Respondent about releasing a CD of The Cleveland Orchestra's performance of the *Opera Rusalka*, he quoted the Festival rates based on the Live Recording Agreement. (Tr. 208). This was the first agreement he turned to. (Tr. 223). The Festival informed the Respondent that the pricing was too high and gave the Respondent a maximum amount it could pay. (Tr. 208). Giestling testified, "Since it was not the amount required under the Live Recording Agreement, in - - in a normal instance we would have just said no." (Tr. 208). However, in this instance, the Respondent approached Local 4 about attempting to complete the project and was ultimately informed that the project could be completed under only the Live Recording Agreement. (Tr. 208-14). Respondent's actions in regards to the *Rusalka* project strongly suggest it was well aware the project fell under the Live Recording Agreement.

**III. Judge Fine correctly found Respondent's withdrawal from the multi-employer bargaining group did not relieve it of its duty to recognize and bargain with the AFM**

Judge Fine correctly relies on Holiday Hotel and Casino, 228 NLRB 926 (1977) and related cases<sup>3</sup> to find that the Respondent's bargaining obligation to the AFM did not cease when it withdrew from the multi-employer group. The Respondent's withdrawal has no impact on the presumption that the AFM enjoys majority status. 227 NLRB at 357. In order to rebut this

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<sup>3</sup> *Ponderosa Hotel & Casino, Inc.*, 233 NLRB 92, 94 (1978); *Nevada Lodge*, 227 NLRB 368 (1976); *Tahoe Nugget, Inc.*, 227 NLRB 357 (1976); *Silver Spur Casino*, 228 NLRB 1147 (1977).

presumption, the Respondent had the responsibility of showing that the union “in fact no longer enjoys majority status or that its refusal to bargain was predicated on a reasonably grounded doubt as to the continued majority status.” Id. Respondent presented no evidence on these points.

Instead of addressing its failure to demonstrate that the AFM has lost majority status, the Respondent argues that the AFM was acting as the parent and agent of Local 4. However, as Judge Fine finds, there is no record evidence supporting this contention. Rather, as outlined above, the record evidence fully supports Judge Fine’s finding that the parties have developed a bifurcated bargaining relationship and that the AFM and Local 4 act as joint representatives of the musicians, with each having its own respective areas of bargaining responsibility.

Thus, Judge Fine correctly analyzes this case as a joint representation situation, where an employer is not free to bargain with one bargaining representative at the exclusion of the other. Ozanne Constr. Co., 317 NLRB 396, 398 (1995); CBS Broad., Inc., 343 NLRB 871, 872 (2004).

While the Respondent argues that Judge Fine has created a new legal term by finding the AFM and Local 4 serves as joint exclusive bargaining representatives, Board law firmly recognizes the rights of such representatives. This is amply demonstrated by the case law Judge Fine cites. In Ozanne Construction Co., 317 NLRB 396 (1995), the Board found that two unaffiliated unions, Teamsters Local 416 and SEIU Local 47, served as the joint exclusive collective bargaining representatives of a unit of employees working at a single location. In CBS Broadcasting, Inc., 343 NLRB 871 (2004), the Board recognized two affiliated unions representing different geographic areas of the country as the joint exclusive bargaining representatives of a national unit of employees.

Further, the Board has addressed the situation at issue here, where local and national offices of the same union jointly represent a single unit of employees. In Reynolds Metal Co., 310 NLRB 995 (1993), the Board found that the International and Local union served as joint exclusive bargaining representatives of units of employees in three plants, with the International leading bargaining over issues of national importance and the Local bargaining independently in areas of only local relevance. Id. at 996-99. Judge Fine's reliance on M & M Transportation Co., 239 NLRB 73 (1978) and General Electric Co., 150 NLRB 192 (1964) is well-placed, as they provide direct support for the proposition that when an employer is engaged in national negotiations with a parent union that employer may violate the Act by insisting on bargaining with a local union on matters that are appropriately the subject of those national negotiations.

Judge Fine correctly found that the bargaining history in this matter has created a pattern where the AFM, and not Local 4, has led bargaining over the production and distribution of most electronic media. Having consistently recognized the AFM's authority in this area for years, the Respondent is not now free to attempt to force Local 4 to bargain in these areas.

The Respondent is unable to provide any legal justification for its attempt to walk away from its legal obligations to the AFM. Respondent's reliance on Medo Photo Supply Corp., 321 U.S. 678 (1944) is misplaced. That case involves an Employer who bypassed the union and dealt directly with employees. The case does not address an employer's responsibilities after it recognized two unions as joint bargaining representatives of its employees. Likewise, Oakwood Care Center, 343 NLRB 659 (2004), which addresses the appropriateness of a unit comprised of solely and jointly employed employees under Section 9(b), is inapplicable to these facts.

Judge Fine correctly finds that Chicago Magnesium Castings, 256 NLRB 668 (1981) and Newell Porcelain Co., 307 NLRB 877 (1992) are not controlling under these facts. As Judge

Fine explains, the issue of the representational status of the parent body in Chicago Magnesium Castings was not addressed. In Newell Porcelain Co., the case presented a fact pattern where a local union affiliated with a parent and the parent attempted to replace the local as the employees' bargaining representative. The Board found there was never a valid demand for bargaining made. This is the not the case here.

Here, the Respondent recognized the AFM as the bargaining representative for musicians over electronic media, bargained with AFM for decades as that representative, and then walked away from the relationship. The cases Respondent cites do not address an employer abandoning its bargaining obligation despite the existence of a lengthy and substantial bargaining history.

**IV. Judge Fine correctly rejects the Respondent's arguments that the potential of conflicting clauses in the Local and AFM agreements obviates its obligation to bargain with the AFM**

In its brief, the Respondent argues that recognition clauses, union security clauses and no-strike clauses in both the Local and AFM agreements create an unworkable bargaining relationship. As aptly noted by Judge Fine, the bargaining history between the parties demonstrates that there is nothing unworkable about having dual contract provisions in the national and local contracts. For over thirty years, the Respondent has been party to contracts with both the AFM and Local 4. The specific facts presented by this case demonstrate that the dual terms at issue can easily coexist.

First, as fully detailed above and presented by Judge Fine in his decision, the concept of joint exclusive bargaining representatives is firmly established by Board law. Second, the AFM's Bylaws provide that any musician who is eligible to be a member of a local is eligible to be a member of the AFM. (Jt. Ex. 19, p. 44). The Local collective bargaining agreement's union

security clause requires the musicians of The Cleveland Orchestra to become a member of the AFM within 31 days of commencing employment. (Jt. Ex. 6, pp. 55-56). Thus, the Local union security clause actually requires membership in the AFM and does not contradict the union security clauses appearing in the AV Agreement (Jt. Ex. 1, p. 3), the Live Recording Agreement (Jt. Ex. 5, pp.1-2) or its proposed Integrated Media Agreement (Jt. Ex. 20, p. 2).

The three existing AFM media agreements, the AFM's proposed Integrated Media Agreement and the Local collective bargaining agreement cover different working conditions, with the AFM agreements covering the production and distribution of certain electronic media and the Local agreement covering live performances, rehearsals for those performances, radio broadcasts and local television broadcasts. Thus, the grievance arbitration provisions cover contract disputes over different working conditions. To the extent the parties have agreed to a no-strike clause as part of these contracts or may propose such clauses in the future, the waiver of the right to strike would apply to different disputes arising under different contracts and would not contradict each other. Contrary to Respondent's assertions, the parties have shown themselves capable of making separate contracts mesh in the past and they can certainly do so going forward.

Counsel for the General Counsel recognizes that the bargaining relationship that has developed in this case is somewhat unique, in that the AFM and Local 4 have entered into separate collective bargaining agreements with the Respondent. However, Judge Fine correctly found that the AFM, and not Local 4, has led bargaining over the production and distribution of most electronic media. Having consistently recognized the AFM's authority in this area for years, the Respondent is not now free to attempt to force Local 4 to bargain in these areas. "[A] long established bargaining relationship evidenced by successive contracts will not be disturbed

by the Board unless repugnant to the Act's policies." BASF-Wyandotte Corp., 276 NLRB 498, 501 (1985). The fact is that Respondent is attempting to erase its substantial bargaining history with the AFM. Judge Fine correctly concluded that the Respondent's actions violated Section 8(a)(1) and (5). Thus, Counsel for the General Counsel respectfully submits that Judge Fine's recommended Order should be adopted.

Respectfully submitted,

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**Proof of Service**

I hereby assert that copies of the foregoing Answering Brief of Counsel for the General Counsel were served by electronic mail this 8<sup>th</sup> day of March, 2011 to the following:

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