BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In The Matter Of:	)	
AMERICAN FEDERATION OF MUSICIANS	)	
Charging Party	)	CASE NO. 08-CA-38834
-and-	)	
THE MUSICAL ARTS ASSOCIATION	)	
Respondent	)	

ANSWERING BRIEF OF CHARGING PARTY AND INTERVENOR AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA

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On January 13, 2011, Administrative Law Judge Eric M. Fine issued a decision ("ALJ Decision") finding that Respondent Musical Arts Association ("MAA") violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the American Federation of Musicians ("AFM"), and refusing to bargain with the AFM, after voluntarily recognizing and bargaining with the AFM for nearly thirty years. MAA has filed Exceptions from the ALJ Decision. The AFM, as Charging Party and Intervenor, submits this brief in response to MAA's Exceptions and in support of the ALJ Decision. The AFM additionally joins in Counsel for the General Counsel's Answering Brief and urges the Board to adopt the ALJ's recommended Order in its entirety.

I. INTRODUCTION

MAA operates The Cleveland Orchestra ("Orchestra") and employs its musicians. For nearly thirty years, MAA engaged in a pattern of bargaining with both the AFM and the AFM's affiliated local, the Cleveland Federation of Musicians, Local 4 ("Local 4"). Pursuant to that pattern, MAA negotiated collective bargaining agreements with Local 4 ("Trade Agreements") covering primarily live performances, rehearsals for live performances, local television broadcasts and radio broadcasts, while it negotiated collective bargaining agreements with the AFM covering certain electronic media issues such as the creation and exploitation of CDs, DVDs and national television broadcasts ("Electronic Media Agreements").[1]

In 2009, MAA was unable to achieve terms to its liking in negotiations with the AFM over a successor to the Electronic Media Agreements. As a consequence of its

[1] The Electronic Media Agreements consist of the Symphony, Opera or Ballet Orchestra Audio-Visual Agreement ("A-V Agreement"), the Symphony, Opera or Ballet Orchestra Internet Agreement ("Internet Agreement") and the Symphony, Opera or Ballet Orchestra Live Recording Agreement ("Live Recording Agreement").

inability to reach satisfactory (to its mind) Electronic Media Agreements with the AFM, MAA withdrew recognition from the AFM and unequivocally refused to bargain with it. Instead, MAA insisted, for the first time in its nearly hundred-year history – and in contravention of nearly thirty years of bargaining with the AFM over the topics covered by the Electronic Media Agreements – that Local 4 and only Local 4 was its proper bargaining partner for those topics.

It is axiomatic that an employer cannot withdraw recognition from an incumbent union unless the union has lost the support of a majority of bargaining unit members. But the AFM continues to enjoy the majority support of the Orchestra musicians – which MAA cannot and does not deny – and the ALJ properly found that in withdrawing recognition from the AFM, MAA violated the Act.

MAA's response to the situation in which it finds itself is to attempt to justify its withdrawal of recognition from the AFM by challenging the legality of its decades-old joint bargaining relationships with the AFM and Local 4. The balance of this Brief addresses, and refutes, MAA's various factually and legally unsupported assertions.

II. JOINT REPRESENTATION BY TWO UNIONS IS LAWFUL, AS IS THE DIVISION OF BARGAINING AUTHORITY IN WHICH EACH HAS AUTHORITY OVER DIFFERENT TOPICS

MAA argues that it is unlawful for an employer to recognize two unions, or, in the alternative, that it is unlawful to recognize two unions where they have distinct and separate lines of bargaining authority.[2] That assertion flies in the face of ample case law

[2] Even if MAA's position on this point had any merit – which it does not – the assertion of it would be time-barred, because, as the ALJ Decision properly noted, an employer may not attack the validity of its recognition of a union after the Section 10(b) six-month period has run. Local Lodge No. 1424 (Bryan Mfg. Co.) v. NLRB, 362 U.S. 411 (1950). ALJ Decision at p. 15, lines 3-10. As the ALJ Decision recites, and as we show below, MAA recognized the AFM *decades* prior to its withdrawal of recognition.

involving certified or recognized joint exclusive bargaining representatives, including cases endorsing the separation of lines of bargaining authority among different representatives. Radio Corporation of America and Local 11, 135 NLRB 980 (1962); General Electric Co., 150 NLRB 192 (1964), *enforced*, 418 F.2d 736 (2d Cir. 1969); M&M Transportation Co., 239 NLRB 73 (1978); CBS Broadcasting, Inc., 343 NLRB 871 (2004); Reynolds Metal Co., 310 NLRB 995 (1993).

Indeed, when parties have developed a "workable pattern of bargaining" in which joint exclusive representatives have divided authority, with each empowered to negotiate only the topics over which it has authority, the Board will enforce that longstanding bargaining pattern, particularly when it conforms to union governance requirements and the recognition agreements reached by the parties.[3] Radio Corporation, *supra,* 135 NLRB at 981, 983. And, where an employer has recognized joint representatives, and has engaged in a long history of negotiations with one of them on certain topics, it "is in no position" to question that union's representative status on those issues.[4] General Electric Co., *supra* at 206-207.

[3] The employer in Radio Corporation had recognized the IBEW as the "sole and exclusive collective bargaining representative" for all plant bargaining units where either the IBEW or one of its locals had been recognized as the "sole and exclusive collective bargaining representative." The employer and the IBEW had a longstanding bargaining pattern, consistent with union rules and the expectations of union members, in which the IBEW negotiated an agreement that covered all units, and its affiliated locals negotiated local riders. Unlike Radio Corporation, this case does not involve plant-wide or multiple unit bargaining; the ALJ Decision simply orders MAA to engage in good faith negotiations with AFM regarding its own Orchestra musicians. But the principle of giving effect to longstanding patterns of bargaining is perfectly *apropos* in this case.

[4] In General Electric Co., one of the joint representatives was the international union, which had long negotiated the company-wide issues affecting many separate bargaining units at GE. As with Radio Corporation, that particular bargaining pattern is not at issue in the present case, because here, the ALJ's Order simply enforces MAA's bargaining obligation to the AFM as an individual employer and has nothing to do with multi-employer or multi-unit bargaining. But the strong statement of underlying principle quoted in text is entirely applicable: an employer may

III. THE RECORD IN THIS CASE DEMONSTRATES A DECADES-OLD WORKABLE PATTERN OF BARGAINING

Faced with the above precedent, MAA focuses the bulk of its attention on an effort to show that there was no "workable pattern of bargaining" in its relationships with the AFM and Local 4 – either because Local 4 really has authority over all media, or because MAA never really recognized the AFM, or because the agreements it negotiated with the AFM were somehow lacking, or because the bifurcation of authority between the AFM and Local 4 is unclear, or because the Electronic Media Agreements and the Trade Agreements somehow conflict. The ALJ found to the contrary on all these points and the record fully supports his findings, however, as we now show.

A. The AFM Always Retained Authority Over Media, and MAA's Relationship with Local 4 Acknowledged that Fact, Even Before MAA Entered Into the Electronic Media Agreements with AFM

The Electronic Media Agreements, in which MAA explicitly recognized the AFM, are at the heart of this case, and we discuss them in depth below. But we start with the relationships between the parties that were in place before the existence of those agreements, because MAA has suggested that prior to the Electronic Media Agreements, Local 4 had jurisdiction and negotiated over the topics they encompass. The record does not bear that claim out.

As the ALJ noted, a bifurcation of bargaining authority between AFM and its affiliated locals is the natural result of the AFM Bylaws.[5] The AFM Bylaws reserve final authority over electronic media bargaining to AFM; AFM members are prohibited from

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not engage in a long and comprehensive course of collective bargaining with a union on certain topics, and then walk away from its good faith bargaining obligation with that union.

[5] AFM members authorize *both* the AFM and their locals to "act as their exclusive bargaining representative." See Article 5, Section 27(a) of the AFM Bylaws, Jt. Ex. 19 at p. 21. See, ALJ Decision at p. 12, lines 39-47 and p. 22, line 5.

taking employment to produce a media product except under agreements that either are negotiated or approved by the AFM.[6] AFM locals are expressly permitted to negotiate wages for local television and radio, but are not allowed to negotiate other electronic media terms except by prior permission of the AFM.[7] Instead, AFM occupies the field of commercial electronic media by negotiating industry-wide (and individual employer) collective bargaining agreements covering the production and exploitation of such media products as CDs, television, motion pictures and commercial announcements.[8]

In the orchestra world, these union rules have led to an accepted division of bargaining authority in which AFM locals negotiate the terms and conditions governing live performances, rehearsals for live performances, local television, radio, and certain media uses like archival recordings that have no commercial application, but leave to the AFM all issues related to the electronic media fields covered by the Electronic Media Agreements.[9] Orchestra employers recognized and accepted this division of authority.[10]

MAA's relationship with Local 4 fits that pattern exactly. Local 4 President Leonard DiCosimo testified that he gives effect to that division of authority in

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[6] See Article 15, Section 1(a) of the AFM Bylaws, Jt. Ex. 19 at p. 72.

[7] See, Article 15, Sections 6(a) and (b) of the AFM Bylaws, Jt. Ex. 19 at pp. 72-73; in other respects, AFM locals are limited to negotiating CBAs for members performing live within the local jurisdiction, see Article 5, Section 27(b) of the AFM Bylaws, Jt. Ex. 19 at p. 21. These general principles, which require explicit AFM approval for a local to negotiate any media other than local media, apply to locals in the orchestra context as well as in general; see Article 14, Section 4(b), Jt. Ex. 19 at p. 69.

[8] Transcript ("Tr.") at p. 80-81; ALJ Decision at p. 17, lines 29-44.

[9] Tr. at pp. 48-49.

[10] Jt. Ex. 16. In Jt. Ex. 16, Joe Kluger, then-President of the Philadelphia Orchestra and Chairman of the Managers' Media Committee, an industry-wide employer organization, wrote to orchestra employers that the newly-negotiated Internet Agreement "supplements, but does not replace, existing AFM electronic media agreements, such as the Phonograph Record Labor Agreement and the Audio-Visual Agreement. These AFM agreements remain in force and will continue to govern the creation of television programs, as well as the production of physical product (CD's, LP's, DVD's, audio-or video tapes) … ."

negotiations with MAA.[11] And, as the ALJ properly found, the Local 4 Trade Agreements with MAA as far back as 1967 (the earliest Trade Agreement in evidence) reflected the bifurcation of authority between AFM and Local 4.[12] Thus, the 1967 Trade Agreement requires explicitly that "[t]he rules and regulations of the American Federation of Musicians pertaining to recording will be applicable to all commercial recordings."[13] That provision survives as Paragraph 13.4 of the 2006-2009 Trade Agreement, Jt. Ex. 6, and is reiterated in Paragraph 3.7 of that Agreement.[14] The only media terms actually covered by the Local 4 Trade Agreement are those specifically permitted by the AFM, such as local television, radio, and archival tapes.[15]

MAA produced not one shred of evidence at trial (and points to none in its Exceptions) that it has ever produced a commercial CD, non-local television program or other media product covered by the Electronic Media Agreements pursuant to an agreement with Local 4. To the contrary, the record shows, and the ALJ found, that both before and after the negotiation of the first Electronic Media Agreements, MAA only produced the kind of media projects they cover pursuant to AFM, not local, agreements. For example, MAA Executive Direct Gary Hanson acknowledged that when The

[11] Tr. at pp. 124-125, 132-133; ALJ Decision at p. 8, lines 17-41.

[12] ALJ decision at p. 17, lines 34-39.

[13] Article 28(d) of 1967 Trade Agreement between Local 4 and MAA, MAA Exhibit 3 at p. 30; ALJ Decision at p. 5, lines 23-28, p. 17, lines 33-39, p. 22, lines 38-40.

[14] Jt. Ex. 6 at pp. 3, 44. These terms are carried forward in the Trade Agreement until 2012 by virtue of the January 19, 2010 agreement between Local 4 and MAA, which carried forward all the terms of the 2006-2009 Trade Agreement not altered by the January 19 agreement or by discussions shortly thereafter. Jt. Ex. 7.

[15] Article 12 contains provisions governing the creation, handling and ownership of archival tapes (see Par. 12.1, 12.2 and 12.6). It permits the use of tapes for grant applications and similar limited purposes, but forbids their reproduction, distribution or transmission, thereby forbidding their commercial exploitation (see, Par. 12.2-e). It provides terms for radio broadcasts simulcasts (and guarantees payment for 36 such broadcasts (see Par. 12.3 and 12.4). See, Jt. Ex. 6.

Cleveland Orchestra recorded Beethoven's Ninth Symphony in the mid-1980s, it did so with a recording company partner, Telarc, under Telarc's Phonograph Record Labor Agreement with the AFM.[16] And, when MAA wished to release material from its radio archives as CDs in 2001 and 2003, it negotiated "radio to noncommercial" agreements with the AFM to permit and cover the use, which, as the ALJ properly notes, demonstrates plainly MAA's recognition that Local 4 had no authority over the matter and that the Local 4 Trade Agreement did not cover it.[17] And, most recently, when MAA wished to release the 2008 recording of *Rusalka* as a CD in 2010, it priced the project under its Live Recording Agreement with the AFM, and, although it expressed a desire to release *Rusalka* under the Local Trade Agreement instead for a cheaper price, it did not do so when musicians made clear that the Local 4 Trade Agreement did not cover it.[18]

B. From 1982 Forward, MAA Has Explicitly Recognized the Federation as the Bargaining Representative for Media Topics Covered by the Electronic Media Agreements

Given that background, it is clear that the AFM – contrary to MAA's assertions – was neither encroaching on Local 4 authority nor acting as its agent when it negotiated the Electronic Media Agreements at the heart of this case.

In fact, negotiations for each of those three agreements arose out of the desire of orchestra institutions to negotiate media terms directly with the AFM that were tailored to their needs.[19] As described below, they typically negotiated as a group for convenience,

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[16] Tr. at p. 272.

[17] ALJ Decision at p. 17, line 46, to p. 18, line 9; the 2001 and 2003 "radio to noncommercial" agreements between MAA and AFM are Jt. Exs. 22 and 23.

[18] Tr. at pp. 208, 223, 301; ALJ Decision at p. 11, line 42 to p. 12, line 29.

[19] Tr. at pp. 82-83 (A-V Agreement); Tr. at pp. 62-63 and 237 and Jt. Ex. 16 (Internet Agreement); Tr. at pp 115-117 and 272 (Live Recording Agreement); ALJ Decision p. 17, lines 3435 and lines 39-44.

but each institution reserved the right to decide individually whether to execute any resulting agreement; on a few occasions, they formed true multi-employer groups with the intent of being bound by group action. In either case, the resulting media agreements did not clash with CBAs negotiated by AFM locals; to the contrary, each *required* an employer to be a signatory to a local CBA as a condition precedent to signing the Electronic Media Agreements and enjoying its benefits.[20]

1. The A-V Agreement

The first A-V Agreement was concluded in 1982 and gave signatory orchestra institutions favorable terms for national and foreign television and other audio-visual productions as compared to existing AFM television agreements.[21] MAA became a signatory to the first A-V Agreement in 1982 and to each successor A-V Agreement, on a continuous basis, including the most recent agreement that was effective from February 1, 2006 through January 31, 2008.[22]

From 1982 through 1999, MAA adhered to each successive A-V Agreement as an individual institution by signing a "Letter of Acceptance" in which it acknowledged that it had read, understood, and voluntarily adopted the agreement, "and each and every provision" thereof, "as its own … Audio-Visual Agreement" with the AFM.[23] Among the provisions MAA thus adopted as its own was the A-V Agreement's Recognition clause, which states that MAA "hereby recognizes the [AFM] as the exclusive bargaining

[20] Jt. Ex. 1 (the A-V Agreement) at p. 1; Jt. Ex. 2 (the Internet Agreement) at p. 1; Jt. Ex. 5 (the Live Recording Agreement) at p. 1; ALJ Decision at p. 18, lines 20-23 and 37-39, p. 19, lines 5-10, p. 22, lines 36-38.

[21] Tr. at pp. 82-83; Jt. Stip. 2;

[22] Jt. Stip.2; Jt. Stip. 3;

[23] Jt. Stip. 4; Jt. Ex. 14 (A-V Agreement Letter of Acceptance).

representative of persons employed as musicians who are employed by [MAA] in audio-visual activities covered by this Agreement."[24]

Beginning in 1999, the orchestra employers formed a Managers' Media Committee ("MMC") which provided the AFM with a list of employers, including MAA, which agreed to be bound by the specific successor agreements.[25] MAA Executive Director Gary Hanson was the Chairman of the MMC during the negotiation of the most recent A-V Agreement covering the period ending January 31, 2008, and he provided and signed the MMC list to the AFM for that negotiation.[26]

In sum, MAA has explicitly recognized the AFM as the exclusive bargaining representative for the media covered by the A-V Agreement for *nearly thirty years.* For the first *seventeen* of those years, it did so as an individual employer. For the last several years it played a leading role in multi-employer negotiations with the AFM.

2. The Internet Agreement

The Internet Agreement was first negotiated in a facilitated discussion (not multi-employer bargaining) with orchestra employers including MAA, and MAA was one of the original orchestras that signed the agreement and recommended it to others in 2000; it also agreed to extend the Agreement twice.[27] The Internet Agreement covers the exploitation of audio recordings on the Internet; the Internet was a new medium at the time and the Internet Agreement essentially established a structure that allowed local

[24] Jt. Ex. 1 (A-V Agreement) at p. 3.

[25] Jt. Stip. 4.

[26] Jt. Stip. 4; Jt. Ex. 15.

[27] Jt. Stip. 6; Jt. Stip. 7; Jt. Stip 8; Jt. Ex. 16; ALJ Decision at p. 18**,** lines 33-35.

committees made up jointly of an orchestra's musicians and managers to make many decisions on a local basis.[28]

3. The Live Recording Agreement

The Live Recording Agreement was concluded in 2006 and gave signatory orchestra institutions favorable terms for the production and commercial exploitation of CDs from live concerts, as compared to the AFM's recording industry agreement, in return for provisions that required the orchestra institution (and not a recording company) to own the recording, and that gave the orchestra's musicians the right to approve or disapprove recording projects.[29]

For the purpose of negotiating the Live Recording agreement, the MMC convened a multi-employer group for a limited period of time, and MAA's Gary Hanson was the MMC Chairman and spokesperson during that period.[30] That group expired before reaching agreement, and MAA did not join the group that subsequently re-formed and reached agreement in 2006. *Id.*

However, MAA signed the Live Recording Agreement in 2007, acting as an individual employer, by executing a Letter of Acceptance in which it acknowledged that it had read, understood, and voluntarily adopted the Live Recording Agreement, "and each and every provision" thereof, "as its own … Live Recording Agreement" with the AFM.[31] Among the provisions MAA thus adopted as its own was the Live Recording Agreement's Recognition clause, which states that MAA "hereby recognizes the [AFM]

[28] Jt. Ex. 2 (Internet Agreement) at Par. 5 and Par. 6.a.; Tr. at pp. 62, 361; Jt. Ex. 16.

[29] Tr. at pp. 58, 115-117; Jt. Ex. 5 (Live Recording Agreement); Jt. Ex. 9; ALJ Decision at p. 5, lines 45-51 and p. 6, lines 48-51.

[30] Tr. 315-316, 321; Jt. Stip. 15; ALJ Decision at pp. 5-6.

[31] Jt. Stip. 10; Jt. Ex. 17 (Live Recording Agreement Letter of Acceptance).

as the exclusive bargaining representative of Musicians who are employed by [MAA] in the creation of live audio recording products covered by this Agreement."[32]

4. MAA's Continued Recognition of the AFM in 2007-2009 Negotiations for a Successor to the Electronic Media Agreements

MAA continued to recognize the AFM on a continuous basis from November 2007 to May 2009. During that period, MAA participated in multi-employer negotiations with the AFM that began as negotiations for a successor A-V Agreement, but which the parties ultimately agreed to expand to cover a proposed new, comprehensive media agreement that would succeed all three Electronic Media Agreements, and that would, in addition, cover non-local radio for the first time.[33] MAA's Gary Hanson was a key player in the negotiations, serving as the MMC chairman. *Id.* These multi-employer negotiations ended on May 9, 2009, without a final agreement having been reached. *Id.*

After the multi-employer negotiations broke down, participating employers (and those signatories who had not participated in the negotiations) continued to be bound to the terms of the Electronic Media Agreements as required by Section 8(a)(5) of the Act. The AFM then set about to negotiate with various orchestra employers over successor Electronic Media Agreements, and successfully negotiated comprehensive "integrated media agreements" with many of them, each on a single employer basis.[34]

5. MAA's Withdrawal of Recognition from the AFM

MAA took a radically different course than these other institutions. MAA and Local 4 began negotiations for a successor Trade Agreement in June 2009. In those

[32] Jt. Ex. 5, Paragraph 9.

[33] Jt. Stips. 13, 14, 15; Tr. at p. 70; ALJ Decision at p. 20, lines 19-43.

[34] Tr. at p. 73

negotiations, MAA made a comprehensive media proposal to Local 4 that included topics covered by the Electronic Media Agreements.[35] For the first time in its one hundred year history, MAA insisted that Local 4 was its proper bargaining partner for those topics.

The nature of MAA's proposals on these topics is very telling – they were for significantly lower media compensation than MAA had previously agreed to in any AFM negotiations, or that MAA had ever paid to its Orchestra musicians under the Electronic Media Agreements. *See*, General Counsel Exhibit 7.

Local 4 responded that AFM was the recognized bargaining representative for those issues, that it would not bargain with MAA over them, and that MAA should conduct any bargaining on those issues with AFM.[36] However, MAA notified the AFM in writing that it refused to negotiate with the AFM, and the charge and Complaint in this case ensued.[37]

Representatives of Local 4, AFM and MAA met on March 1, 2010 and May 10, 2010 regarding media, and during those meetings the AFM presented, as part of its

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[35] Jt. Stip. 18; ALJ Decision at p. 21, lines7-10.

[36] Jt. Stip. 19; ALJ Decision at p. 21, lines 10-13. The record contains no evidence that MAA ever filed a refusal-to-bargain charge against Local 4 arising from Local 4's refusal to engage with MAA over Electronic Media Agreement issues.

[37] Jt. Stips. 20-25. MAA said by letter dated August 10, 2009 that it "no longer intend[ed] to bargain on a multi-employer basis in connection with media rights or any other matters," *see* Jt. Ex. 8, and MAA continues to argue that its withdrawal from the 2007-2009 multi-employer group justifies its withdrawal of recognition from the AFM. That argument makes no sense. As an initial matter, MAA acted as a single employer when it recognized the AFM as the representative of its employees by executing the A-V Agreement, the Internet Agreement and the Live Recording Agreement; in fact, MAA's recognition of the AFM long predated and is utterly independent of any multi-employer group. And, in any event, even if MAA's initial recognition of the AFM had derived from joining a multi-employer group and becoming bound by group action, MAA's withdrawal from the group would not relieve it of its duty to bargain with the AFM. To the contrary, "the presumption of majority status flowing from the contract in the multiemployer unit survives [the employer's] timely withdrawal from that unit and carries over the newly created single-employer unit." Holiday Hotel & Casino, 228 NLRB 926, 928 (1977, *enforced*, Carda Hotels, 604 F.2d 605 (9th Cir. 1979). In the present case, MAA has been, and remains, a single-employer unit with a bargaining obligation to the AFM

proposal, an "Integrated Media Agreement"; however, MAA maintained its position that it owed no bargaining obligation to the AFM and was only willing to negotiate with the AFM as a "representative of Local 4," and no agreement was reached.[38]

In short, having decided in 2009 that it was dissatisfied with its decades-old bargaining pattern with the AFM and Local 4, MAA persistently sought to unilaterally alter that bargaining pattern by refusing to negotiate with the AFM.

C. The ALJ Decision Correctly Found That the Record Demonstrated a Longstanding and Workable Pattern of Bargaining

MAA's Exceptions are little more than a scattershot of arguments made in an attempt to persuade the Board that there is no pattern of bargaining in this case, or that the pattern is unworkable. But none of these arguments hold up to the record, as the ALJ properly found.

1. MAA's Arguments That There Is No Pattern of Bargaining Have No Weight

The record, laid out in detail above, shows beyond question that MAA has long been party to a pattern of bargaining involving divided authority among two representatives. Local 4 has never asserted authority or negotiated over the topics covered by the Electronic Media Agreements, and MAA has recognized the AFM is its bargaining partner with authority over those topics for nearly thirty years.

Contrary to MAA's arguments, the fact that the Internet Agreement and Live Recording Agreement are not decades old (unlike the A-V Agreement, which *is* decades old) is immaterial; neither stands alone, but rather each is part of the entire long course of dealing between MAA and the AFM.

[38] Jt. Stip. 26; Jt. Ex. 20.

Contrary to MAA's arguments, the depth and strength of its relationship with the AFM is not undermined by the fact that MAA did not ultimately produce any media projects under the Internet Agreement; as the ALJ correctly found, MAA negotiated the Agreement, renewed it twice, and negotiated with the AFM over its subject matter in the 2007-2009 negotiations.[39] Nor does the fact that the Internet Agreement recites that it is "experimental" mean that the AFM's authority over the topic was fleeting; as the ALJ found, the Internet Agreement also provides that Internet use and recording will be prohibited in the absence of a successor agreement.[40]

MAA's arguments about the Live Recording Agreement are equally unavailing. MAA argues that it signed the Live Recording Agreement at Local 4's behest. But that argument that cuts against MAA, because it demonstrates that Local 4 conducted itself (as did MAA) in accordance with the longstanding division of authority between AFM and Local 4.[41] And although MAA signed an agreement with its Orchestra musicians approving projects under the Live Recording Agreement, doing so only fulfilled the project-by-project approval requirement that is integral to the Live Recording Agreement.[42]

At bottom, MAA's random attacks on the Internet and Live Recording Agreements cannot cast doubt on the existence of a pattern of bargaining, because each agreement is simply part of a decades-long course of dealing in which MAA understood the limit of Local 4's authority, accepted and recognized the AFM's representative status,

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[39] ALJ Decision, p. 28, lines 33-50.

[40] *Id.*

[41] ALJ Decision at p. 20, lines 10-13.

[42] Jt. Ex. 5 (LRA) at p. 2; Jt. Ex. 21; *see, supra*, note 29 and accompanying text; ALJ Decision at p. 19, lines 27-39.

concluded agreements with the AFM, and produced the media covered by AFM agreements *only* under those agreements.[43]

2. The Division of Authority Between Local 4 and the AFM Has Been, and Remains, Workable

Nor is there any merit in MAA's arguments that the division of authority between AFM and Local 4 is so poorly delineated and riddled with conflicts that it is unworkable. That argument flies in the face of the fact that the pattern of bargaining has worked seamlessly for decades. In fact, the confusing overlap that MAA hypothesizes simply does not exist.

The Live Recording Agreement does not overlap with the Local 4 Trade Agreement – only the former covers the production of commercial CDs from concerts. The Trade Agreement explicitly requires that commercial recordings may only be released pursuant to AFM Agreements,[44] and although MAA argues that Paragraph 12.1-e of the Trade Agreement could govern release of a commercial CD, it cannot point to one example of a CD release under the Trade Agreement.[45]

Nor is the coverage of radio hopelessly confused, as MAA asserts. The AFM has historically permitted its locals to negotiate terms and conditions for orchestra radio broadcasts, and the Local 4 Trade Agreement properly covers that topic.[46] The parties in

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[43] Jt. Stip. 27 and Jt. Ex. 18 provide extensive examples of MAA producing PBS television shows and/or DVDs under the A-V Agreement, and CDs under the Live Recording Agreement. There is *no* evidence that MAA produced non-local television, DVDs, or any CDs under the Local 4 Trade Agreement – it never did.

[44] Jt. Ex. 6, paragraphs 3.7 and 13.4; ALJ Decision at p. 5, lines 23-28 and p. 17, lines 33-39.

[45] ALJ Decision at p. 17, lines 46 to p. 18, line 9; *see, supra*, notes 16-18 and accompanying text.

[46] MAA makes much of the fact that the Trade Agreement provides that radio broadcasts may be simulcast on the Internet and streamed for fourteen days thereafter, arguing that this shows confused jurisdiction between the Internet Agreement and the Trade Agreement. But the Internet

the 2007-2009 multi-employer negotiations agreed to include radio coverage as part of a new, comprehensive media agreement with the AFM; but since that agreement was not concluded, coverage remains under the Local 4 Trade Agreement unless the parties agree otherwise, which they are free to do. MAA is a sophisticated party that runs one of the top-rated orchestras in the world, and this status of radio coverage is hardly too complex for it to understand.

In an effort to bolster its arguments about overlapping authority, MAA also hypothesizes problems that it claims will arise from alleged conflicts between a handful of provisions in the Local 4 Trade Agreement and the Electronic Media Agreements, suggesting that it will require "a whole new area of federal labor law" to figure them out. The ALJ rightly disposed of this parade of hypothetical horribles.[47]

A glance at the alleged conflict that MAA suggests is most serious tells the whole story. MAA lists an entire page of hypothetical questions that it says will arise if it agrees to the language of Paragraph XXXV (Effect of Nonrenewal of Agreement) of AFM's proposed Integrated Media Agreement. *See* Jt. Ex. 20 at p. 46. But, virtually identical language has always existed in the A-V Agreement, *see* Jt. Ex. 1 at pp. 2-3 (Effect of Non-Renewal of This Agreement), so that, in fact, MAA has lived with that language for *nearly thirty years*, and the record is devoid of any evidence of a problem ever having arisen. Similarly, no problems have ever arisen from the fact that the Trade

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Agreement leaves the determination of such streaming provisions to local musicians with their managements**.** *See, supra,* note 28 and accompanying text.

[47] ALJ Decision at p. 24, line 18 to p. 25, line 5.

Agreement and the Electronic Media Agreements all have recognition clauses, grievance procedures, union security provisions and different expiration dates.[48]

Even if MAA were correct that bargaining over certain topics in the Electronic Media Agreements created potential problems, that would not justify the withdrawal of recognition – and that is the only question arising in this case. But the truth is that although MAA has worked hard to create an aura of confusion and conflict surrounding the interrelationships between the Trade Agreement and the Electronic Media Agreements, these agreements in fact have worked together seamlessly. Indeed, they are designed to do just that, since Electronic Media Agreements are only available to employers that have signed a trade agreement with an AFM Local.[49]

3. MAA Is Not Privileged to Withdraw Recognition from the AFM for Its Own Convenience, or to Enhance Its Leverage, or to Alter the Bargaining Dynamic Among the Parties

The issue in this case is not really whether there is an established pattern of bargaining with the AFM over Electronic Media Agreements (there is), or whether that established pattern of bargaining between the AFM, Local 4 and MAA is "unworkable" (it is not). The issue is that MAA has decided unilaterally that it now would prefer to do things in a different way. Whether that is because MAA now believes that all the possible "tradeoffs" in negotiations should be dealt with in one agreement, as it argues in its Brief in Support of Exceptions, or whether, as the ALJ Decision aptly found, because MAA sought to get a better deal from Local 4 "than it thought it could get from the

[48] Contrary to MAA's assertions, the grievance/arbitration provisions do not conflict, because the provision in each CBA only applies to issues arising under that CBA. And the union security clauses in the agreements do not conflict, either, because they *all*, even the Trade Agreement, require membership in the AFM.

[49] ALJ Decision at p. 22, lines 36-38; *see, supra,* note 20 and accompanying text.

AFM," *see* ALJ Decision at p. 25, lines 25-28, is immaterial. The Act does not allow an employer to withdraw recognition to suit its convenience; rather, the Act requires that an employer that has voluntarily recognized a union has a continuing duty to bargain with that union while it maintains majority status. Nor can employer's desire to enhance its leverage or change the bargaining dynamic privilege the withdrawal of recognition. Congress has not "authorize[ed] the Board to put its thumb on the scales in the bargaining process." Publishers' Association of New York City v. NLRB, 364 F.2d 293 (2nd Cir. 1966).

V. CONCLUSION

The AFM respectfully requests that the ALJ's recommended Order be adopted.

Respectfully submitted,

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PROOF OF SERVICE

I hereby assert that copies of the foregoing Answering Brief of Charging Party and Intervenor American Federation of Musicians of the United States and Canada, were served by electronic mail this 10th day of March, 2011 to the following:

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