

**The Musical Arts Association and American Federation of Musicians of The United States and Canada, AFL–CIO/CLC.** Case 8–CA–38834

June 28, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE  
AND HAYES

On January 13, 2011, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order.<sup>1</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Musical Arts Association, Cleveland, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Kelly Freeman, Esq.*, for the Acting General Counsel.  
*Frank W. Buck, Esq.* and *Kathryn E. Siegel, Esq.*, of Cleveland, Ohio, for the Respondent.  
*Jeffrey R. Freund, Esq.*, of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Cleveland, Ohio, on September 21 and 22, 2010. The charge was filed on March 8, 2010, by the American Federation of Musicians of the United States and Canada, AFL–CIO/CLC (the AFM) against The Musical Arts Association (referred to here as Respondent, the MAA, or the Cleveland Orchestra).<sup>1</sup> The complaint, as amended, alleges the AFM and Cleveland Federation of Musicians, Local 4 of the American Federation of Musicians of the United States and Canada, AFL–CIO/CLC (Local 4) are joint collective-bargaining representatives of the specified bargaining unit, and that Respondent violated Section 8(a)(1) and (5) of the Act by on or about September 9, withdrawing its recognition of the AFM as joint exclusive collective-bargaining representative of the unit and has failed and refused to bargain with AFM regarding the terms and condi-

tions of employment of the unit relating to the production and use or development of electronic media, including but not limited to CDs, DVDs, digital recordings including those available on the Internet, and television broadcasts for other than a local market.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs by the Acting General Counsel and the Respondent, I make the following<sup>2</sup>

FINDINGS OF FACT

I. JURISDICTION

Respondent, a nonprofit corporation, with an office and place of business in Cleveland, Ohio, herein called Respondent's facility, has been engaged in the operation of the Cleveland Orchestra, a symphony orchestra. Annually, Respondent, in conducting its operations, derives gross revenues, excluding contributions which, because of limitations by the grantor, are not available for operating expenses, in excess of \$1 million, and on an annual basis Respondent purchases and receives at its Cleveland facility products, goods and materials valued in excess of \$5000 directly from points outside of Ohio. Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the AFM and Local 4 are each labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The parties worked out a 31 paragraph stipulation prior to the start of this proceeding which, along with the documents referenced therein, was entered into evidence. There were four witnesses called to testify, two by the Acting General Counsel and two by the Respondent. The Acting General Counsel witness William Foster is a musician in the National Symphony Orchestra in Washington, DC. Foster, an AFM member since 1968, is the Electronic Media Committee chair for the International Conference of Symphony and Opera Musicians known as ICSOM which is an organization of the players of the largest symphony orchestras in the United States. Foster has been the chairman of the committee since 2003, and he communicates between the committee and the Symphonic Services Division of the AFM. Foster participates in AFM symphonic media negotiations as a spokesman for the musicians, and he serves on the AFM's bargaining committee. Foster has participated in bargaining for the AFM Symphony, Opera or Ballet Orchestra Audio-Visual Agreement (AV Agreement), and the AFM's Live Recording and Internet Agreements. The Acting General Counsel witness Leonard Di Cosimo has been the president of Local 4 since January 1, 2005, and an officer in Local 4 since 1996. Di Cosimo testified the AFM is the parent body of Local

<sup>1</sup> For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB 11 (2010), Member Hayes would not require electronic distribution of the notice.

<sup>1</sup> All dates are 2009, unless otherwise specified.

<sup>2</sup> In making the findings herein, I have considered all the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), reversed on other grounds 340 U.S. 474 (1951). Further discussions of the witnesses' testimony are set forth here.

4, and the AFM represents the employees who are members of the Cleveland Orchestra. He testified Local 4 handles all of the issues contained in Local 4's Trade Agreement with the Cleveland Orchestra, and the AFM handles all the issues covered in the national media agreements which include the AFM's Live Recording, Internet and AV Agreements. Respondent witness Gary Hanson has been the executive director of the Cleveland Orchestra since March 2004; was the associate executive director from 1997 to 2004; and has been employed by the Orchestra since 1988. Hanson has been involved in collective bargaining on behalf of the Cleveland Orchestra, also referred to as the MAA. Respondent witness Gary Ginstling, at the time of the trial had been the general manager of the MAA for 2 years.

Ginstling testified a review of the MAA's archival documents shows a relationship between the MAA and Local 4 dating back to Cleveland Orchestra's founding in 1819. He identified a Trade Agreement between the MAA and Local 4 covering the years 1967 to 1970. The Trade Agreement contains in article 34(a) a "Recognition and Union Security" provision recognizing Local 4, "as the sole and exclusive collective bargaining agent" for musicians employed by the Cleveland Orchestra." The 1967 Trade Agreement also contains a section entitled, "Broadcasts, Telecasts and Recording." Under article 25, pertaining to "Sustaining Broadcasts Within Regular Services" it states, "Tapes of such performance may be made without extra charge for delayed broadcast in accordance with the approval of the President of the American Federations of Musicians and the Executive Board of the Union." Similarly, article 28 entitled, "Recording Guarantee" provides at 28(d) that "The rules and regulations of the American Federation of Musicians pertaining to recording will be applicable to all commercial recordings."

Foster testified locals can bargain over media issues with approval of the AFM, and that AFM national agreements generally recognize that local media is covered in local agreements. Foster testified that, prior to the advent of the AFM's AV, Internet and Live Recording agreements, nationally distributed symphonic recording took place. In this regard, there were AFM collective-bargaining agreements with recording companies covering this type of production called the Phonograph Recording Labor Agreement. Foster testified there were also commercial television agreements with the AFM, including the National Public Television Agreement, and there were also film agreements. Foster testified there were a lot of AFM national agreements not specific to symphony orchestras, but symphony orchestras producing electronic media worked under those agreements.

Foster testified the AFM in conjunction with the orchestras developed a Radio to Non-Commercial Agreement in the 1990s. He testified these took the form of individual agreements between the institution and the AFM for each project. Foster identified the "Cleveland Orchestra Christoph Von Dohnanyi Retrospective Radio Broadcasts to Non-Commercial Recording Special Letter of Agreement" executed in November 2001, and the "Cleveland Orchestra Robert Shaw Tribute Radio to Non-Commercial Special Letter of Agreement," executed in August 2003, as two such radio project agreements executed between the AFM and the MAA. The Christoph Von Dohnanyi

Agreement relates "to the creation of a non-commercial recording created from 28 different works performed between 1984 and 2001." The agreement set the compensation Cleveland Orchestra members received for CD recordings of the encompassed performances relying on the AFM "Phonograph Record rate," along with a corresponding contribution for each musician to the American Federation of Musicians and Employer's Pension Fund (AFM/EPF). It stated the MAA agreed to be bound by the Agreement and Declarations of Trust establishing the Pension Fund, which was incorporated by reference in the Letter of Special Agreement. The MAA agreed to deduct union dues from the musicians' compensation and forward them to the AFM. The agreement stated that "nothing in this Agreement shall in any way set a precedent for future agreements between the orchestra musicians and the Employer." The agreement provided that any disputes arising from the agreement were to be resolved through the grievance and arbitration procedure of the collective-bargaining agreement between the orchestra and the employer signatory hereto, or if there was no grievance arbitration procedure in the agreement the matter would be submitted for binding arbitration to the American Arbitration Association. A copy of the agreement was forwarded to Local 4. The Robert Shaw Agreement related to the creation of a noncommercial recording from previously paid for radio broadcast tapes created from four different works performed between 1960 and 1995. The Robert Shaw Agreement contained provisions similar to those described in the Christoph Von Dohnanyi Agreement set forth above. Hanson testified he was involved in the discussions leading up to the Christoph Von Dohnanyi Agreement between the MAA and the AFM. He testified he had a clear understanding that this agreement and the Robert Shaw Agreement were explicitly agreed to by the parties as not constituting precedent for future agreements. He cited the language contained in each of those agreements to that effect.

The MAA was signatory to the initial AFM AV Agreement effective from January 1, 1982, to July 31, 1984. The MAA was signatory to each successor AV Agreement on a continuous basis, including the most recent agreement effective from February 1, 2006, to January 31, 2008. For each of the AV Agreements up until the 1996 to 1999 agreement, orchestra institution managers met jointly with the AFM in convenience bargaining, but each institution decided on an individual basis whether to execute the resulting agreement. The MAA signed a letter of acceptance on January 16, 1998, to accept the AV Agreement in effect from February 1, 1996, to July 31, 1999. For each subsequent AV Agreement or extension, an employer committee known as the Managers' Media Committee (MMC) provided the AFM with a list of employers, including the MAA referred to therein as the Cleveland Orchestra, that had agreed to be bound by that AV Agreement or extension. Hanson, the executive director of the MAA and then chair of the MMC, signed off on a list of 67 orchestras including the MAA, which was provided by the MMC to the AFM for the negotiation of the February 1, 2006, to January 31, 2008 AV Agreement. Hanson was the chair of the MMC throughout the negotiation for that agreement.

The February 1, 2006, to January 31, 2008 AV agreement

contains a "Union Recognition" article providing that "The Employer hereby recognizes the Federation (the AFM) as the exclusive bargaining representative of persons employed as musicians who are employed by the Employer in audio-visual activities covered by this Agreement." The 2006 AV Agreement states that "The intent of this Agreement shall be to provide a means by which the employer may develop audio-visual musical programs ('A/V Product') intended for Television (Standard and/or Non Standard); Internet and/or Home Video use (as those terms are herein defined), on a basis that will provide revenue participation for the musicians employed, while offering the Employer realistic opportunity to create such programs." The agreement by its terms only applies to "musicians who are employed by the Employer in the United States under the terms and conditions of a CBA . . ." The agreement states it "shall not cover the release on local television of AV product broadcast or syndicated solely within the geographical boundaries of the Federation Local where the Employer is located." The AV agreement contains a union-security clause pertaining to the AFM. It also contains a pension provision requiring certain contributions to the AFM/EPF. The agreement contains a grievance arbitration provision for the initiation of grievances by the AFM or the Employer against the AFM.

The AFM's initial Symphony, Opera or Ballet Orchestra Internet Agreement (Internet Agreement) had effective dates from February 2, 2000, to January 31, 2002. By memo to executive directors of various orchestras, dated July 29, 2002, Joseph Kluger, president of the Philadelphia Orchestra Association and then chair of the MMC, described the Internet Agreement and identified 28 orchestra or opera employers, including the MAA, that had participated in the negotiation of the agreement with the AFM effective beginning February 2, 2000. Kluger stated the parties had "reached tentative agreement on terms and conditions of the distribution of live and pre-recorded audio music product on the Internet. Intended as an experimental way for orchestra, opera and ballet institutions to maximize the opportunities and challenges of the Internet, it will permit 'Streaming' and 'Downloading' of audio music product owned and/or controlled by our institutions (i.e. all audio material except recordings created under the Phonograph Record Labor Agreement), subject to the case-by-case approval of a joint management-musician committee within each institution." Kluger stated, "This new Internet Agreements 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 physical product (CD's LP's, DVD's, audio or video tapes), which cannot be manufactured or sold under this Agreement." Separate memorandums of understanding extended the Internet Agreement through September 30, 2004, and then again through March 31, 2005.

The MAA participated in the negotiations leading to the initial AFM Internet Agreement, was one of the original signatories to the agreement, and was part of the employer group that extended the Internet Agreement through the cited memorandums of understanding. The Internet Agreement states that it is an "experimental" agreement covering musicians and other

named job classifications "covered under a collective bargaining agreement ('Local CBA')" between a local of the AFM and an employer that is a symphony orchestra, ballet or opera institution located in the United States. The Internet Agreement provides the AFM shall exercise full authority in order that its Locals and members engaged in activities under the agreement shall do nothing in derogation of the terms of the intent of the agreement. The Internet Agreement provides at section 3(b) that "Upon the 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." The Internet Agreement required certain pension contributions to the AFM/EPF. The Internet Agreement provided that disputes should be resolved through the grievance and arbitration procedures established under the agreement.

Foster testified he was a participant in the negotiations for the Internet Agreement. Foster testified it was an experimental agreement because at the time the Internet was a new medium that had not been exploited to any great degree by orchestras. Foster testified the agreement was designed to give institutions flexibility to develop a body of experience that could be used to produce a more thorough successor agreement. Hanson testified he was part of the electronic media forum which held meetings in 1999 to 2000 pertaining to the Internet Agreement. He testified in early forum discussions it was articulated that any resulting agreement would be experimental in order to make it clear that neither party had an ongoing obligation to the agreement following its expiration. Hanson testified it was his understanding there would be no ongoing responsibility for the MAA under the Internet Agreement after it expired. Hanson testified to his knowledge the MAA has never done a project under the Internet Agreement.

There was a Trade Agreement between MAA and Local 4 effective from September 4, 2006, to August 30, 2009. The 2006 Trade Agreement provides at article 21.1 that Local 4 "is the sole and exclusive bargaining agent for all Musicians employed by the Association as members of The Cleveland Orchestra." The Trade Agreement contains a union-security provision pertaining to Local 4, and a grievance and arbitration provision relating to the terms of the Trade Agreement. Article 3 of the Trade Agreement is entitled "Compensation." It states at section 3.7 that, "Electronic Services; For electronic media services: in accordance with the A.F.M. Sound Recording Labor Agreement or other applicable document." Article 13 is entitled "Phonograph Recording." It states at section 13.4 that, "The rules and regulations of the American Federation of Musicians pertaining to recording will be applicable to all commercial recordings."

There was a Symphony, Opera or Ballet Orchestra Live Recording Agreement (Live Recording Agreement) effective from July 14, 2006, to July 13, 2009, between the AFM and the MMC. The Live Recording Agreement states that it is an "Experimental Agreement." The Live Recording Agreement provides the employer recognizes the AFM as the exclusive bargaining representative of musicians who are employed by the employer in the creation of live audio recording products covered by the agreement for the purpose of establishing the wages, and terms and conditions applicable to the creation of those

live audio recording products. The Live Recording Agreement, by its terms, applies to musicians, among other positions, employed by the employer in the production of audio master recordings from performances of symphony, opera or ballet orchestras, including the production of such audio master recordings from archival tapes of live performances, where the live performance is subject to a CBA between the employer and a local of the Federation. The agreement applies only where a physical product from a master recording is distributed for sale. The agreement does not cover studio recordings.<sup>3</sup> The Live Recording Agreement contains: a union security provision concerning a membership requirement in the AFM; a pension contribution requirement to the AFM/EPF; and a grievance and arbitration provision. By letter of acceptance dated, January 27, 2007, the MAA became signatory to the Live Recording Agreement.

Hanson testified the MMC is an industry committee for which Hanson has served as chairperson for a period of time. Hanson testified he was involved in a portion of the negotiations for the Live Recording Agreement while Hanson was chairperson for the MMC. Hanson testified the MMC formed a multiemployer bargaining group in 2005 for the negotiation of the Live Recording Agreement, of which the MAA was a member when it was formed. Hanson testified the names of the employers who were part of the multiemployer group, including the MAA, were provided to the AFM. Hanson testified the MAA did not continue as a member of the multiemployer group when the groups' sunset deadline passed and the group dissolved around November 2005. The multiemployer group reformed around 6 months after it dissolved. Hanson testified after the MAA left the multiemployer group a new group of employers formed the multiemployer group and reached agreement with the AFM on the Live Recording Agreement, signed by the AFM and the MMC on May 24, and 25, 2006, respectively. Hanson understood that, while the MAA was participating in multiemployer negotiations with the AFM for a Live Recording Agreement, had an agreement been reached the MAA had agreed to sign that agreement. Hanson testified that Hanson in effect was the chair of the employers' multiemployer group during the negotiations while the MAA was a member of the group and that he was one of the communicators for the employer group at the bargaining table. He testified the parties were clear that the Live Recording Agreement was to be an experimental agreement, as it says in the paragraph labeled

"Term" that "The Agreement shall be an Experimental Agreement with a term of three years from its effective date . . . ." Hanson testified it was his understanding at the outset of negotiations that designating the agreement as experimental made it clear there was no obligation to continue with the agreement after its expiration.

Hanson testified one of the key issues in the negotiations for the Live Recording Agreement, during the time the MAA participated, was a project by project approval provision. Hanson testified the AFM's position on project by project approval was eventually adopted in section 8 of the Live Recording Agreement. Hanson testified that under the project by project approval requirement it is not the AFM that engages in the project by project approval but the local orchestra musicians who do it. Hanson testified project by project approval, as embodied in the Live Recording Agreement, was a significant reason the MAA chose to withdraw from the multiemployer negotiations. Hanson testified the MAA believed it was an impractical way to undertake the business of making recordings. He explained that in order to make a recording to be distributed internationally the employer requires a partner which is generally a record company. He testified the MAA could not make a deal with a record company not knowing in advance what rights it could grant that company.

Hanson testified that, during the 2006 Trade Agreement negotiations with Local 4, the MAA agreed with Local 4 and the Cleveland Orchestra musicians to undertake nine preapproved recording projects, and at the request of Local 4, the MAA agreed to sign the AFM's Live Recording Agreement pertaining to those projects. Hanson testified it was the MAA's intention to sign the Live Recording Agreement for convenience in order to have set terms and conditions that would govern the recordings the MAA agreed to with Local 4. Hanson testified the MAA was clear, at the time, with Local 4 that the signing of the Live Recording Agreement was not in any way binding on the MAA to sign any successor agreement beyond the expiration of the agreement. The "Memorandum of Agreement" signed by the MAA, the Cleveland Orchestra Committee, and Local 4 in mid-January 2007 states the Orchestra Committee of the Cleveland Orchestra and the MAA acknowledge they have met and discussed up to nine specified projects to be recorded under the terms of the "Memordum of Agreement between the American Federation of Musicians and the Symphony, Opera, Ballet, Orchestra Managers' Media Committee ('National Recording Agreement')." The "Memorandum of Agreement" between the MAA, Local 4, and the Orchestra Committee states that "Upon the execution of this Memorandum of Agreement, MAA will become signatory to the 'National Recording Agreement' for the purposes of producing said projects. There is no expression of intent by MAA, upon expiration of the National Recording Agreement in August of 2009, to sign any successor agreement, nor is there an expression of intent by the Parties to reengage in the project pre-approval process of 2006." Hanson acknowledged this sentence did not reflect the AFM's intent because the AFM was not a party to the "Memorandum of Agreement". Hanson signed an acceptance of the AFM's Live Recording Agreement on January 27, 2007, wherein it states the MAA, as the employer, "has read, under-

<sup>3</sup> Foster testified there exists a Sound Recording Labor Agreement which the AFM generally negotiated with record companies, with input from the symphonic managers for proposals relating to symphonic topics. He testified under the Sound Recording Labor Agreement the record companies own the copyrights to the recorded product. Foster testified one of the reasons the MMC approached the AFM seeking a Live Recording Agreement was to negotiate more flexible terms with less initial cost for recording projects than those available under the Sound Recording Labor Agreement. Foster testified the MMC represented they were interested in something that would not eventually belong to a recording company which may not have an interest in marketing it 20 years later. Foster testified the Live Recording Agreement covers production of recordings from live performances, but studio recording is still subject to the Sound Recording Labor Agreement.

stands and voluntarily accepts and adopts”. . . “each and every provision” of the Live Recording Agreement, which is in full force and effect from July 14, 2006, to July 13, 2009. As set forth above, The Live Recording Agreement contained a recognition clause of the AFM.

Hanson testified the Live Recording Agreement expired for the Cleveland Orchestra on its July 13, 2009 expiration date. Hanson testified he did not believe the Live Recording Agreement was ever renewed. Hanson testified the MAA no longer considers itself to be bound by the Live Recording Agreement, but the MAA continues to use its terms for convenience. Hanson testified he believes the MAA has choices in the area of media activity as to which agreement they employ in pursuing a particular media project and they can play these choices out with their employees as they see appropriate. Hanson testified, since the Live Recording Agreement has expired, he did not believe it could be enforced against the MAA, giving the MAA a choice as to whether to employ its terms when it undertakes a media project.

The MAA was party to multiemployer bargaining with the AFM from November 2007 to May 9, 2009. This bargaining was initially aimed at negotiating a successor agreement to the AV Agreement that was effective from February 1, 2006, to January 31, 2008. During the course of the negotiations the parties agreed to negotiate a comprehensive agreement replacing the AV, Internet, and Live Recording agreements. Throughout the bargaining the employers involved, including the MAA, bargained through the MMC. Hanson served as chairman of the MMC throughout the referenced bargaining. The bargaining ended on May 9, 2009, without an agreement being reached. Foster testified he participated in bargaining with the MMC during these negotiations. Foster testified that, during the November 2007 to May 2009 negotiations, there was some discussion at the end of including radio broadcasts in what was to be a comprehensive media agreement.<sup>4</sup> He testified there was agreement, before the talks broke down, to include radio into the master agreement. Foster testified the topics the AFM bargained over during these negotiations were encompassed in the AV, Live Recording, and Internet agreements. Foster testified there were 40 or 50 employers in the employer association before it broke up and Hanson was one of the chief spokes persons for the employers negotiating team. Foster explained the AFM negotiations with the MMC started out as discussions for a successor to the AV Agreement, but transformed into negotiations for a new Integrated Media Agreement that would include all symphonic media under one consolidated agreement.

The MAA and Local 4 began negotiations June 1, 2009, for a successor agreement to the September 4, 2006, to August 30, 2009 Trade Agreement. At the outset of the negotiations, the MAA made a comprehensive proposal on electronic media to Local 4 that included proposals both on matters covered by the Local 4 Trade Agreement set to expire on August 30, and on

<sup>4</sup> Foster testified the AFM has not historically bargained over radio broadcasts with symphony managers. Rather, the AFM has agreements with National Public Radio and other broadcasting agencies concerning radio broadcasts.

matters covered by the AV, Internet, and Live Recording agreements. In response to the MAA’s proposals on electronic media, Local 4 took the position that the AFM was the recognized bargaining representative on media issues and any bargaining on those issues should be conducted with the AFM. By Memorandum of Agreement dated January 19, 2010, the MAA, Local 4, and the Cleveland Orchestra Committee renewed and modified the September 1, 2006, to August 30, 2009 Trade Agreement with new effective dates of August 31, 2009, to September 2, 2012.

Di Cosimo testified he has been involved in bargaining with the MAA that has resulted in the 2006 to 2009 Trade Agreement and the 2009 successor agreement as a member of Local 4’s bargaining committee. Di Cosimo testified that, when Local 4 collectively bargains, he attempts to give effect to the division of representation between Local 4 and the AFM. Di Cosimo testified the MAA made a proposal during the January 6, 2010 bargaining session. Di Cosimo testified there were parts of the proposal, mainly contained in item 4, which he did not consider Local 4 to have authority to bargain over. He testified Local 4 did have the authority to bargain over radio broadcasts relating to the 36 week guarantee included in Section 12.3.a of the Trade Agreement, which the MAA sought to eliminate in its proposal. Di Cosimo testified Local 4 did not have the authority to strike AFM references from the Trade Agreement, or to discuss broadcast streaming or other media matters outside Local 4’s jurisdiction which the MAA had included in its proposal. Di Cosimo testified media matters that go national or international are out of Local 4’s purview. Rather, the AFM has authority to bargain over those topics. Di Cosimo testified the 2006 to 2009 Trade Agreement contains references to AFM agreements and rights, and those references remained in the Trade Agreement when it was extended and modified in January 2010. It was Di Cosimo’s view that the MAA being a party to the AV; Internet, and Live Recording agreements recognizing the AFM as the bargaining agent precluded Local 4 from bargaining on those subjects. He testified bargaining over most of the items covered by item 4 of the MAA’s January 6, 2010 proposal entitled “Media Rights” was pretty much a nonstarter for Local 4. Di Cosimo testified Local 4’s position has consistently been for the MAA to approach the proper representative the AFM pertaining to those issues. Di Cosimo testified if bargaining about it came up he would call the AFM for direction.<sup>5</sup> Di Cosimo testified that, during the course of the Trade Agreement negotiations, the MAA repeatedly made proposals to Local 4 over subjects that were otherwise covered by the AV, Internet and Live Recording agreements. He testified Local 4’s response was the MAA had to talk to the AFM as the AFM has jurisdiction over the subjects

<sup>5</sup> Similarly, Foster testified that, during negotiations for a new Trade Agreement with Local 4 in 2009, the MAA sought to bargain over media subjects. Foster testified the AFM had discussions with the Local 4 bargaining committee outlining their bargaining authority and if there were issues that were covered under the three national symphonic media agreements they belonged to the AFM, not Local 4. Foster testified that is consistent with the AFM authority under its bylaws. Foster testified the AFM told Local 4 the AFM was a bargaining agent for these matters and Local 4 agreed with that position.

as bargaining agent. He testified the MAA never agreed the AFM had jurisdiction to bargain over these subjects.

Ginstling was involved in the 2009 Trade Agreement negotiations between Local 4 and the MAA. Ginstling testified some of the MAA's proposals concerning media related to matters covered by the AFM multiemployer agreements. Ginstling testified those subjects were covered in the MAA's proposal because it is almost impossible to distinguish between the different forms of media and the MAA wanted to have one agreement covering all elements of the media. Ginstling testified Local 4 responded to the media proposals by telling the MAA on multiple occasions they could not respond and they would not talk to the MAA about anything concerning media. He testified Local 4 refused to discuss any aspects of media including the radio guarantee, and that Local 4 in its refusal made no distinction between matters covered by the Trade Agreement and matters covered by the multiemployer agreements.

Article 12, of the 2006 to 2009 Trade Agreement is entitled "Audio Taping, Broadcast and Archives." Section 12.3.a contains a broadcast fee to be guaranteed to each musician, along with contributions to the AFM/EPF pension fund covering a period of 36 weeks. Article 12.3.c speaks of the MAA's rights for unrestricted broadcasts of up to a total of 36 programs per season which may be live or taped, stating that each broadcast may be streamed simultaneously and for 14 days following the broadcast via the Internet. Di Cosimo testified that article 12.3.c is part of the radio guarantee section of the Trade Agreement, which is something Local 4 can bargain over. Di Cosimo testified Article 12 of the Trade Agreement refers to and has been applied to radio broadcasts. He testified it has not been applied to any other type of broadcast to his knowledge. There is a provision in the article referring to archival recording. Di Cosimo testified archival recording is not for commercial use or profit. Di Cosimo testified that during the June 1, 2009, to January 19, 2010 negotiations over the Trade Agreement, there was bargaining over sound archival recording.

By letter dated August 10, 2009, from MAA Attorney Frank Buck to AFM President Thomas Lee, Buck stated the MAA no longer intends to bargain on a multiemployer basis in connection with media rights or any other matters. Buck stated to the extent the MAA was part of any multiemployer bargaining group, it withdraws from such group or groups. Buck stated, "From this point forward, the Association (MAA) will bargain on all matters on a single-employer basis with the certified bargaining representative of its musicians." By letter dated August 13, 2009, AFM Attorneys Jeffrey Freund and Patricia Polach responded to Buck. They cited the AV, Live Recording, and Internet agreements stating the terms of live recording, audio-visual and internet projects for the Cleveland Orchestra musicians are currently set by those three agreements between the MAA and the AFM. They stated that as a signatory to the AV agreement the MAA has recognized the AFM as the exclusive bargaining representative of persons employed as musicians who are employed by the MAA in audio visual activities covered by the AV agreement citing article II of the AV agreement. They asserted the MAA had also recognized the AFM as the exclusive bargaining representative for the work covered by the Live Recording and Internet agreements. They asserted that

consistent with this recognition of the AFM, the MAA actively participated in recent multiemployer negotiations with the AFM on these topics. They stated the dissolution of the multiemployer group did not relieve the MAA of its duty to bargain with the AFM over covered media, nor did it give the MAA the ability to choose to negotiate with any other entity, including an AFM local on these subjects. It was asserted that the three cited collective-bargaining agreements remained in effect during negotiations with the AFM for successor agreements, and that the AFM stood ready to negotiate with the MAA.

Buck responded to Freund by letter dated August 17, stating the MAA had an agreement with Local 4 covering topics relating to wages, hours, and working conditions including many terms relating to media issues. Buck stated the agreement contains an extensive article specifying the terms for "audio taping, broadcasts and archives" and another relating to phonograph recording. Buck stated the parties to that agreement were engaged in bargaining for a successor agreement and the MAA intends to continue such bargaining with Local 4 on a range of subjects including media related matters. Buck stated to Freund that:

... the claims asserted in your letter are legally incorrect and impractical. Your assertion that the same bargaining unit can have two different exclusive bargaining representatives is contrary to logic and the basic tenets of federal labor law. The existence of one "exclusive" representative excludes the existence of any other. Also, there is no longer a practical dividing line as to which matters are subject to national rather than local bargaining. In fact, your contention would lead to the anomalous result that a single subject of bargaining could be covered by two bargaining obligations simultaneously.

Freund responded to Buck by letter dated August 24, stating that the "MAA—like the entire community of symphony, opera and ballet orchestra institutions—has negotiated effectively within" the AFM's requested structure for decades, as recently as May of this year. Freund asserted the MAA has always recognized the AFM as the representative of its musicians for work associated with Live Recording, AV, and the Internet agreements. Freund asserted the MAA's agreement with Local 4 does not conflict with any of these agreements. He stated, "On the contrary, it specifically requires (in Articles 3 and 13) that applicable (AFM) agreements apply to electronic media." Freund stated the AFM continued to be ready to negotiate with the MAA at mutually agreeable times and places.

Buck responded to Freund by letter dated September 9. He stated he asked Freund to provide an explanation of how the musicians of the Cleveland Orchestra could have two different "exclusive" bargaining representatives so that the MAA could understand the claim that it must bargain with the AFM concerning media rights. Buck stated in Freund's response he declined to address that question. Buck went on to state, "Please understand that the MAA has no desire or interest in bargaining with the (AFM), and declines to do so." Buck stated the MAA is engaged in bargaining with Local 4, the exclusive bargaining representative of the musicians in its employ, over all mandatory subjects of bargaining, including over media rights. Freund responded by letter dated September 15, stating,

in effect, that it was inconsistent for the MAA to claim that Local 4 was bargaining agent of the MAA's musicians based on a recognition clause in a collective-bargaining agreement, but assert the AFM was not the MAA musicians' bargaining agent even though the MAA and AFM had been parties to a series of collective-bargaining agreements also containing clauses recognizing the AFM as the MAA's musicians' bargaining agent for certain media employment. Freund stated Buck's letter was an unequivocal statement that the MAA was refusing to bargain with the AFM over media rights, and the AFM would exercise its rights as and when it determines appropriate.

On February 24, 2010, Ginstling sent a memo to the musicians of the Cleveland Orchestra, entitled "February 2010 Electronic Media Projects" informing them that the MAA would pay for 3 additional weeks of media projects in February 2010 in accordance with the AFM's AV and Live Recording agreements. The Ginstling memo stated a pension payment would also be made to the AFM/EPF, and that any subsequent payments would be made to the musicians on a revenue sharing basis in accordance with the AV Agreement.<sup>6</sup>

Representatives of Local 4 and the AFM met with MAA representatives on March 1, 2010, and May 10, 2010, to bargain regarding electronic media topics. During these negotiations, the MAA maintained its position that it owed no bargaining obligation to the AFM but was willing to bargain with its representatives as representatives of Local 4, while the AFM maintained its position that MAA's bargaining obligation regarding these media matters was to the AFM, not Local 4. The negotiations did not result in an agreement. During the negotiations on those dates, the AFM presented, as part of its proposal a document entitled, the "Integrated Media Agreement." Ginstling testified that, soon after the agreement on the Trade Agreement was reached, Ginstling approached the chair of the Cleveland Orchestra Committee and suggested they have conversations about media. Ginstling testified he told the chair he was welcome to bring representatives of the AFM to these negotiations. Ginstling testified these nonbinding meetings with the AFM and Local 4 were not initiated at the request of the AFM. Ginstling testified that at the end of the second meeting the MAA was told by AFM Attorney Polach that any agreement had to involve the AFM's Integrated Media Agreement, and that the MAA had to sign that agreement. He testified there were a number of discussions about the AFM's bargaining role to which the MAA asserted the media issues should be part of their local Trade Agreement and AFM insisted the MAA had an obligation to bargain with the AFM as the exclusive bargaining representative on media matters. Ginstling testified he thought the primary topic of negotiation was the size of a finan-

cial guarantee the MAA was willing to make to the musicians. Ginstling testified that, during the second meeting, Buck asked how they expected the MAA to sign the Integrated Media Agreement if it had a recognition clause, a union security clause, a no strike clause, and how could they could reconcile that with the local Trade Agreement. Ginstling did not believe the AFM ever answered that question, stating if they did answer the response was that is just the way it has always been.

Hanson testified the union side proposed the Integrated Media Agreement during the nonbinding negotiations that took place in March and May 2010. The agreement by its terms is between the AFM and the employer. Hanson testified it was his understanding that the union side proposed the Integrated Media Agreement along with a dollar guarantee that in some form the MAA would promise to pay what he believed to be \$5000 to each musician for media activity. Hanson testified he presumed the proposal was that the MAA would agree to the rates in the Integrated Media Agreement and those rates would be used as deductions against and up to the \$5000. Hanson testified the MAA made proposals during the 2010 nonbinding negotiations which related to subject matter contained in the Internet Agreement. Hanson testified the discussions had more to do with the guarantee and jurisdictional matters than the actual substance of the distribution of electronic media. He testified the guarantee discussions were not specifically linked to any particular form of media. Rather, the guarantee proposals were across-the-board and would have encompassed the Internet, if accepted. Hanson testified the MAA made a proposal concerning all forms of media, including the Internet.

Ginstling testified that, during the 2-year period in which he has been the general manager of the MAA, the MAA has either been party to the Internet, Live Recording, and AV agreements or has been living under the terms of those agreements pursuant to federal law. He testified for that 2-year period of time the MAA had been living under the terms of at least the four separate agreements, including Local 4's Trade Agreement. Ginstling testified that, during the summer of 2010, the MAA was in negotiations to release a CD recording of a performance the Cleveland Orchestra had given at the Salzburg Festival in Austria in 2008. The Festival came to the MAA soon after the performance stating they wanted to release the recording on their CD label of historic performances at the Salzburg Festival. The MAA entered negotiations with the Festival over a 12- to 18-month period. The MAA told the Festival how much it would cost to do under the AFM's Live Recording Agreement. The Festival responded it was beyond their means. Ginstling testified since the amount offered by the Festival was not the amount required under the Live Recording Agreement, in the normal instance the MAA would have just said no to the recording. However, since the MAA thought this was such a meaningful project they went directly to the Cleveland Orchestra Committee to see if they had the ability to do the CD under the Local 4 Trade Agreement because there is a clause in the Trade Agreement section 12.1.e permitting the MAA to pursue the sale of archival recordings for commercial release. The Orchestra Committee eventually told Ginstling they would not bring it to a vote because they considered it to be a part of the nonbinding media negotiations going on at that time. Ginstling

<sup>6</sup> The AV and Live Recording Agreements had, by their terms, expired on January 31, 2008 and July 13, 2009, respectively. The MAA has produced other media pursuant to the AV Agreement (including, in recent years, PBS telecasts and/or DVDs of the Cleveland Orchestra performing Bruckner's 5th, 7th and 9th symphonies) and pursuant to the Live Recording Agreement (including the recent release of a CD of Mozart Piano Concertos 23 and 24 recorded in a live performance with Mitsuko Uchida in 2008, and a CD of Beethoven's 9th symphony recorded in a live performance in 2007).

was told they would agree to release it if the MAA was willing to sign the AFM's Integrated Media Agreement. Ginstling testified the MAA was told the only agreement this could be done under was the AFM's existing Live Recording Agreement. He testified the MAA was told clause 12.1.e in the Trade Agreement was no longer valid because the MAA had signed the Live Recording Agreement. Ginstling testified the initial pricing the MAA did for the project for the Salzburg Festival was pursuant to the AFM's Live Recording Agreement which he thought was the operative collective-bargaining agreement under which it should be released. It was only after the Salzburg Festival declined to pay the amount sufficient to cover the project that Ginstling looked to the Trade Agreement. The MAA did not file a grievance under the Trade Agreement's grievance and arbitration procedure over the matter. Hanson also testified when it came to releasing a recording of the Salzburg Festival performance in an electronic format, CD or otherwise, the first thing the MAA looked to was the terms of the Live Recording Agreement. Hanson testified the MAA had other choices concerning releasing the performance and one of those choices would have been to release it under the terms of the Trade Agreement. Hanson testified the MAA has not released it at all.

Foster testified when he uses the term electronic media he is referring to the capture of the live performance of an orchestra and creating an electronic recording which can then be played back at a later date. Foster testified there is a division of representation between the AFM and its affiliated locals. He testified when musicians are performing live performance and preparing for those performances those terms and conditions of employment are covered under agreement between the employer and the local union. If the musicians are performing electronic media services, or if electronic media is being produced from live services that are covered by their local agreement that activity and usage is covered by the national agreements of the AFM. Foster testified the Electronic Media Committee and AFM are guided by the AFM's bylaws in formulating bargaining proposals pertaining to electronic media. Article 14, section 4(b) of the AFM's bylaws provides, in part, that a local symphonic CBA may contain provisions for the orchestra to provide electronic services provided that the International President's office has approved those provisions in advance of the agreement's submission for contract ratification. Article 15, section 1(a) of the bylaws proscribes an AFM member from rendering musical services for any type of audio and/or visual recorded product unless, the person, or entity providing the engagement or employment has previously entered into an appropriate written agreement with, or approved in writing by, the AFM.

Foster testified the AFM's AV Agreement covers the exploitation of audio-visual electronic product for orchestras when both the sound and coordinated picture of the performance of the orchestra are produced and displayed together. He testified there is no type of audio and visual broadcast that the agreement does not apply to for orchestras. Foster testified a local oversight committee is created by the AV Agreement and its purpose is to discuss matters that the AV Agreement permits local parties to discuss and come to an agreement on. He testi-

fied the local oversight committee is not a reference to the local union. Rather it refers to musicians in the symphony, who may or may not be officers of the local union. Foster testified musicians are represented for purposes of the AV Agreement and all matters covered by it by the AFM, and local union officers are not brought into any discussions about matters in the agreement in their capacity as local union officers.

Foster testified the Live Recording Agreement covers orchestras, among other entities, for recordings produced to be distributed as CDs in current technology and any kind of hard copy products made from live performances as opposed to studio recordings. Foster testified the Live Recording Agreement, like the AV Agreement, makes it clear it only applies to orchestras that have local collective-bargaining agreements. Clause 10 of the Live Recording Agreement provides that no signatory to the agreement in its collective-bargaining relationship with a local union will make any proposal that would expressly or impliedly eliminate or modify the terms and conditions of "this Agreement," and any such agreement between an orchestra and a local shall be null and void. It states the AFM shall exercise its full authority in order that its locals and members shall do nothing in derogation of the terms and intent of the Live Recording Agreement.

Foster testified the Internet Agreement was applicable to digital downloads which allowed a recording to be converted to a digital file and then transferred over the Internet and downloaded by the end user on a computer or some other playback mechanism where a consumer listened to the performance. Foster testified the Internet Agreement covered only audio, not audio-visual. He testified anything audiovisual over the Internet was covered under the AV agreement. He testified the Live Recording Agreement was for anything that produced CDs, some kind of hard copy sold as an object to the consumer. However, it was understood an institution that was selling CDs may also want to make the product available by way of digital download so the Live Recording Agreement said if there were digital downloads of the CDs produced under the agreement they would be covered by the Live Recording Agreement. If it was a digital download only with no CD production for sale, it would be under the Internet Agreement.

Hanson testified section 12.3.c of the Trade Agreement contains a reference to the Internet, which Hanson testified was negotiated in the Trade Agreement in 2004. He testified the language was added as a result of an MAA proposal. Hanson testified the MAA made the proposal because, at the time, broadcasting was merging with Internet distribution of music, and the MAA felt it was not adequate to only have a radio broadcast provision and they also needed an Internet provision. Hanson testified that when the orchestra releases broadcasts on the Internet those broadcasts are the same programs that are programmed on the radio under article 12 of the Trade Agreement. Hanson testified these broadcasts on the Internet are for streaming only as opposed to being for sale.

Hanson testified there is an overlap between the Internet Agreement and the Trade Agreement in that the Trade Agreement has a provision for the Internet distribution of recorded music. Hanson testified the MAA distributes recorded music over the Internet under the terms of the Trade Agreement sec-

tion 12.3.c, not under the Internet Agreement. The reference to the Internet is in the second sentence of 12.3.c, which states, in reference to 36 agreed upon programs to be broadcast, that “Each broadcast may be streamed simultaneously and for fourteen (14) days following the broadcast via the internet.” Hanson initially testified that the MAA earned these rights based upon a payment set forth in the agreement, which he described as a radio broadcast fee. He testified the payments, as set forth in the agreement, were guaranteed by the MAA to the musicians and that the MAA also agreed to do a certain number of broadcasts. Hanson testified the guarantee was “what we call the radio guarantee.” However, Hanson testified he believed the number of broadcasts the agreement was referring to was broadcasts, and not specifically radio broadcasts. He testified they are audio broadcasts, as opposed to video broadcasts. He testified there are a lot of cable services that have audio channels. It could come under the cable service on television without any visual. Hanson testified that under the terms of the Trade Agreement, the broadcasts can be live or taped broadcasts of a concert. The broadcast whether live or taped can be streamed simultaneously for 14 days following the broadcast on the Internet.

Hanson testified the MAA applied the Live Recording Agreement several times in that they agreed with Local 4 to do a certain number of projects under its terms. Hanson testified revenue to the Cleveland Orchestra under the Live Recording Agreement has been extremely limited and that revenue has been limited to the Orchestra for all forms of electronic media. Hanson testified the Live Recording Agreement has an Internet provision which applies only if the project begins with the creation of the CD. He testified the agreement provides that if a CD is made for distribution and sale, then under certain conditions the music can also be sold on the Internet. Hanson testified the agreement does not apply for Internet distribution alone, if no CD was made for distribution. Hanson testified if only one CD is made for archival purposes then the Live Recording Agreement would not apply. Hanson testified the Live Recording Agreement would not apply to every performance that is recorded for some type of distribution because the MAA makes a lot of recordings which under the Trade Agreement are played over the radio and on the Internet which are never turned into a CD other than for archival purposes. Hanson testified that, under the Trade Agreement, which is the bulk of their media activity they record every concert and performance for archives. He testified 36 of those performances are also broadcast on radio. Hanson testified the Live Recording Agreement would not apply to those. Hanson testified that he thought the MAA had done between 5 and 10 projects under the live Recording Agreement from the time they signed onto on January 31, 2007, until early 2010. Whereas, under the Trade Agreement they are doing 36 radio broadcast and Internet broadcasts every year.

Hanson testified the MAA has done, in the past 5 years, about one or two projects a year under the terms of the Live Recording Agreement. Hanson testified that a Live Recording Agreement project generates about \$150 per musician for each of the approximately 105 musicians in the Cleveland Orchestra for an estimated total compensation of \$15,000 per Live Re-

ording Agreement project. Hanson testified a Live Recording Agreement Project also generates pension contributions to the AFM/EPF. He estimated the contribution to the pension fund to be 10 percent of the gross amount paid to the musicians. Hanson testified in the average year revenue for the usage of media is probably 75 percent paid under the Trade Agreement and 25 percent under the terms of the AFM multiemployer agreements. He testified the average musician on an annual basis is receiving something above \$2000 a year for the Trade Agreement radio guaranty and an average of \$500 a year under the terms of the AFM agreements, although in the past couple of years the musicians have earned more than \$500 each under the AFM agreements. He testified that in the past year, they could have earned more than a \$1000 per musician under the AFM agreements. Hanson testified pay for musicians for radio broadcasts under the Trade Agreement generates contributions to their individual 403(b) accounts; and payments to musicians under three AFM agreements generate payments on their behalf to the AFM/EPF.

#### A. Analysis

Section 10(b) of the Act precludes inquiry as to the lawfulness of recognition granted under Section 9(a) of the Act outside the 10(b) period that was not challenged within the 10(b) period. See *Strand Theatre of Shreveport Corp.*, 346 NLRB 523, 536–537 (2006), *enfd.* 493 F.3d 515 (5th Cir. 2007); *Alpha Associates* 344 NLRB 782, 782–784 (2005); *Expo Group*, 327 NLRB 413, 431 (1999); *Royal Components, Inc.*, 317 NLRB 971, 972–973 (1995); *Gibbs & Cox, Inc.*, 280 NLRB 953, 967 *fn.* 21 (1986), *review denied* 904 F.2d 214 (4th Cir. 1990); *International Hod Carriers (Roman Stone Constructions)*, 153 NLRB 659 (1965); and *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960). The Board has also held that, the presumption of majority status flowing from the contract in a multiemployer unit survives a respondent employer’s timely withdrawal from that unit and carries over to the newly created single-employer unit. *Holiday Hotel & Casino*, 228 NLRB 926, 928 (1977), *enfd.* 604 F.2d 605 (9th Cir. 1979). See also *Ponderosa Hotel & Casino, Inc.* 233 NLRB 92, 94 (1978); *Nevada Lodge*, 227 NLRB 368 (1976), *enfd.* 584 F.2d 293 (9th Cir. 1978); *Tahoe Nugget, Inc.*, 227 NLRB 357 (1976), *enfd.* 584 F.2d 293 (9th Cir. 1978); and *Silver Spur Casino*, 228 NLRB 1147 (1977), *enfd.* 623 F.2d 57 (9th Cir. 1980).

In *Vermont Marble Co.*, 301 NLRB 103 (1991), in concluding that an international union was the sole representative of the employees therein, as opposed to a joint representative of the employees with certain local unions as contended by the respondent employers, the factors considered included contract language designating the international union as the exclusive bargaining representative, the international union’s bylaws confirming it as such, as well as other contractual language bolstering that conclusion. Similarly, in *Tree-Free Fiber Co.*, 328 NLRB 389, 398 (1999), the judge concluded upon consideration of the parties bargaining history including the administration of the collective-bargaining agreement and its participation in contract negotiations that, “despite the language recognizing the signatory Locals as the sole collective-bargaining

agent, a longstanding past practice developed between the parties which establishes that the International Union is the employees collective-bargaining agent.” The Board stated on review that the General Counsel excepted to the judge’s failure to find that the international and the locals are joint bargaining representatives. The Board in *Tree-Fiber Co.*, supra at 389 fn. 4, concluded this omission by the judge was inadvertent error as:

... the judge’s factual analysis of the relationship between the International and the two Locals with regard to the representation of the predecessor’s bargaining unit employees establishes that they are joint collective-bargaining representatives. See *BASF-Wyandotte Corp.*, 276 NLRB 498, 504–505 (1985). This finding of joint status has no effect on the validity of the Union’s May 8, 1996 request to bargain. Thus, although the written request identified only the International as the representative of the Respondent’s employees, it was signed by the president of Local 57 as well as the International’s representative. Moreover, it is settled law that one of the labor organizations sharing joint representation rights may act on behalf of the others. See, e.g., *Suburban Newspaper Publications*, 230 NLRB 1215 fn. 4 (1977).

Similarly, in *Ozanne Construction Co.*, 317 NLRB 396 (1995), enfd. 112 F.3d 219 (6th Cir. 1997), SEIU Local 47 and Teamsters Local 416 were the joint exclusive collective-bargaining representative of the respondent employer’s employees in the specified bargaining unit. The respondent employer was found to have violated Section 8(a)(1) and (5) of the Act when it withdrew its recognition of Local 47 as the joint collective-bargaining representative of the unit, and modified the unit without the consent of Local 47. See also *CBS Broadcasting, Inc.*, 343 NLRB 871, 872 (2004), where two unions were held to be joint representatives.

In *Reynolds Metal Co.*, 310 NLRB 995 (1993), an international union and its Local 155 had been designated the exclusive joint collective-bargaining representative of employees at three plants at issue. The international and its respective locals represented 11 or 12 plants nationwide. Historically, the international and its locals had engaged in joint national bargaining pursuant to provisions in the international’s constitution. The joint bargaining committee determined the agenda for the national negotiations and had the authority to negotiate on behalf of all of the locals at the various plants. At the conclusion of national negotiations each local bargained with its respective plant management over local work rules and other locally unique working conditions. While the international’s constitution provided that the international president could authorize a local union to bargain on its own behalf, no such authority was given to Local 155. The Board, in affirming the judge’s finding that the employer did not violate the Act by failing to negotiate with Local 155 about the implementation of a national substance abuse policy, stated that under the international’s constitution it was a matter for the joint bargaining committee composed of representatives of the international union and member locals. The Board cited the international’s constitution for the proposition that matters within each local’s bargaining jurisdiction are matters that are of concern only to that local and shall

not conflict with the jurisdiction established by the joint bargaining committee.

In *M & M Transportation Co.*, 239 NLRB 73, 76 (1978), the Board approved a judge’s conclusion that an employer did not violate the Act by refusing to bargain with a local union about the decision to close and effects of closing of a terminal. The judge concluded the local union was the exclusive collective-bargaining representative of the employees at the terminal. However, the employer was closing multiple facilities and not just the one bargaining unit, and the Teamsters national agreement applied to the multiple units along with a local supplement to the facility at issue. The judge noted that both the Teamsters International and the employer’s management recognized the need for high level negotiations, and did in fact conduct those negotiations. In dismissing the refusal to bargain charge filed by the local union pertaining to its one facility bargaining unit, the judge stated:

In an analogous situation, the Board held that an employer does not violate Section 8(a)(5) of the Act by dealing with the parent International Union, instead of the designated or Board-certified local union, concerning multiunit matters. *Radio Corporation of America*, 135 NLRB 980, 983 (1962). As the Board held in that case:

Surely the Board is not such a prisoner of a narrow interpretation of its own findings concerning appropriateness of a separate bargaining unit that it cannot recognize a workable pattern of bargaining developed by the parties which, while giving due recognition to such separate units, also seeks to accommodate the interests of local and national bargaining.

Indeed, the Board has held that an employer, while engaged in national negotiations with the parent union, may violate Section 8(a)(5) by attempting to deal separately with locals on matters which are properly the subject of national negotiations. *General Electric Co.*, 150 NLRB 192, 193 (1964), enfd. 418 F.2d 736, 755 (2d Cir. 1969), cert. denied 397 U.S. 965. Conversely, the Board has held that an employer does not violate Section 8(a)(5) by dealing with a local union, even though the parent International is the designated or certified collective-bargaining representative, when the International has acquiesced in such bargaining at the local level. *Braeburn Alloy Steel Division, Continental Copper & Steel Industries, Inc.*, 202 NLRB 1127 (1973); *American Laundry Machinery Company*, 107 NLRB 1574, 1577 (1954). In sum, the Board looks to the realities of the relationship among the parties, not merely to the identity of the designated or certified collective-bargaining representative.

In *M & M Transportation Co.*, supra at 73 fn. 1, in affirming the judge that the employer did not unlawfully fail to bargain with the local union over the effects of the shutdown of its general commodity operation and the total cessation of its business, the Board relied on its conclusion that the employer met its bargaining obligation in bargaining with the international union and the eastern conference of the union.

In *General Electric Co.*, supra at 206–207, Judge Leff stated:

When, as will be seen, the Company went into the 1960 negotiations, it gave no indication of any desire to depart from the national method of bargaining as historically developed with the acquiescence of all concerned. For the purpose of determining the Respondent's bargaining obligations in this case, it is unnecessary to disturb the Board's appropriate unit findings as heretofore made. As was stated in *Radio Corporation of America*, 135 NLRB 980, "the Board is not such a prisoner of a narrow interpretation of its own findings concerning appropriateness of a separate bargaining unit that it cannot recognize a workable pattern of bargaining developed by the parties which . . . seeks to accommodate the interests of local and national bargaining." Here the parties have developed such a pattern which in the particular circumstances of this case I find to be entirely consistent with the spirit of the Act. As to matters historically delegated to national negotiations, the Respondent has recognized the IUE, through its Conference Board, as the actual bargaining agent for all employees in the aggregate of units represented by delegates to the Conference Board. Having accorded such recognition to the IUE and having entered into the 1960 national negotiations on that basis, the Respondent is in no position in this proceeding to question the representative status of the IUE, and, within the area of such negotiations, must be held to the same standards of good-faith bargaining as would have prevailed had a finding been made in this case that the collective units comprised a single appropriate bargaining unit with the IUE as its exclusive representative.

In the instant case, the MAA had a bargaining relationship with Local 4 since the Orchestra's was founded in 1819. The MAA's historical documents show a collective-bargaining agreement between the MAA and Local 4 beginning in 1967, wherein the MAA recognized Local 4 as the exclusive bargaining representative for musicians employed by the Cleveland Orchestra. Despite its lengthy bargaining history with Local 4, the MAA along with many of its fellow orchestras entered into agreements with the AFM on national issues. This bifurcation of bargaining between the AFM locals and the AFM was even embedded in the MAA's 1967 agreement with Local 4, which included in article 25 an approval requirement by the president of the AFM for certain delayed broadcasts of tapes, along with a statement in article 28 that the rules and regulations of the AFM pertaining to recording will be applicable to all commercial recordings. In fact, prior to the AFM's more formalized direct bargaining with orchestras, the AFM negotiated directly with recording companies pertaining to nationally distributed symphonic recordings, including the AFM's "Phonograph Recording Labor Agreement." The AFM also negotiated directly with National Public Television pertaining to television broadcasts, and had film agreements all of which had been applied by symphony orchestras.

In the 1990s, the AFM negotiated individually with orchestras pertaining to CD recordings of radio broadcasts. Despite the MAA's contention here that Local 4 has been the long time exclusive representative of its employees, the MAA entered two such radio broadcast agreements with the AFM, one in 2001 covering 28 different works performed between 1984 and

2001 setting the compensation of orchestra members for the CD performances of the encompassed performances as per the AFM "Phonograph Record" rate; and a 2003 agreement with similar provisions applicable to four different works performed between 1960 and 1995. These agreements required contributions to the AFM pension fund, and that dues be deducted from the specified revenues to the musicians and forwarded to the AFM. The agreements contained disputes resolutions procedures for matters within the agreement referring them to the grievance arbitration procedures of the local collective-bargaining agreement. While the agreements, by their terms were nonprecedential for future agreements between the orchestra and their musicians, they serve as an acknowledgement by the MAA that certain matters were beyond the province of its collective-bargaining agreement with Local 4, despite the MAA's current protests that Local 4 is now and has always been the exclusive collective-bargaining representative of its employees.

In fact, the MAA was signatory to the initial AFM AV Agreement effective from 1982 to 1984, and each successor AV agreement on a continuing basis, including the most recent effective from February 1, 2006 to January 31, 2008. For the AV agreements subsequent to the one expiring on July 31, 1999, the MMC negotiated the agreements on behalf of a list of orchestras, including the MAA, which was provided to the AFM in advance of the negotiations. Hanson, the executive director of the MAA, and then chair of the MMC signed off on a list of 67 orchestras, including the MAA, which the MMC presented to the AFM for the negotiation of the 2006 AV Agreement. The 2006 AV Agreement contains a recognition clause by the signatory orchestras of the AFM as the exclusive representative of the orchestras' musicians for audio visual activities covered by the agreement. The AV Agreement by its terms applies only to musicians who are employed under the terms of a collective-bargaining agreement, in essence referring to a local collective-bargaining agreement. The 2006 AV agreement contains a union security clause pertaining to the AFM, and requires pension contributions to the AFM pension fund. The AV Agreement contains a grievance and arbitration clause for matters covered by the agreement. Thus, for a period of over 25 years the MAA was a party to the AFM's national AV Agreement. The last of which was negotiated with Hanson serving as chair of the MMC's negotiating committee on behalf of the employers. The 2006 AV Agreement contained language marking the split between matters covered by the national AV Agreement, and those subject to local bargaining. Having been party to such a long term relationship with the AFM, the MAA's claims here that Local 4 is and has always been the exclusive collective-bargaining representative seem rather strained.

The MAA, along with 27 other orchestras, participated in the negotiation of the AFM's initial Internet Agreement, effective from February 2, 2000 to January 31, 2002, and the MAA agreed to two extensions extending the Internet Agreement through March 31, 2005. The Internet Agreement required pension contributions to the AFM/EPF based on earnings covered under the agreement, and it contained a dispute resolution procedure. The Internet Agreement, by its terms was an "ex-

perimental” agreement only applicable where there was a local collective-bargaining agreement in effect. Foster testified the term experimental was applied to the Internet Agreement because it was a new area, and it was to be used as a basis to gain experience to negotiate a successor agreement. Hanson testified term experimental meant if the MAA signed on to the Internet Agreement they had no ongoing obligation following its expiration. Regardless, of the respective spin on the term experimental advanced by Foster and Hanson, the MAA signed two extensions of the Internet Agreement, and the Internet Agreement precludes future use of the Internet by employer signees unless the parties agreed to an extension or a new agreement. Hanson also testified the MAA did not engage in any projects under the Internet Agreement. I do not find this contention to be controlling. Rather, I find the MAA’s execution of the Internet Agreement, and its two extensions is part of a pattern of bargaining by the MAA, as well as many other orchestras, with the AFM on a national level related to certain electronic media matters.

There was a Live Recording Agreement effective from July 14, 2006, to July 13, 2009, between the AFM and the MMC. The Live Recording Agreement states that it is an “experimental agreement.” The Live Recording Agreement provides the employer recognizes the AFM as the exclusive bargaining representative of musicians who are employed by the employer in the creation of live audio recording products covered by the agreement. The Live Recording Agreement applies to musicians employed by the signatory employer in the production of audio master recordings from performances of symphony, opera or ballet orchestras, including the production of such audio master recordings from archival tapes of live performances, where the live performance is subject to a CBA between the employer and a local of the AFM. The agreement applies only where a physical product from a master recording is distributed for sale. The Live Recording Agreement contains: a union security provision concerning a membership requirement in the AFM; a pension contribution requirement to the AFM/EPF; and a grievance and arbitration provision. By letter of acceptance dated, January 27, 2007, the MAA became signatory to the Live Recording Agreement.

Hanson’s testimony reveals he was the chairperson of the MMC during a portion of the negotiation of the Live Recording Agreement with the AFM, and as such Hanson participated in those negotiations on behalf of the MMC and of the multiemployer group for which the MMC was negotiating. The MAA did not continue its membership of the multiemployer group after the sunset provision for the group ended its existence in November 2005. The group subsequently reformed without the MAA as member and the MMC at that time negotiated the Live Recording Agreement with the AFM for the existing members. The MMC and AFM signed off on the Live Recording Agreement in May 2006. Hanson testified that while he participated in the negotiations of the Live Recording Agreement, the parties were clear that it was to be an experimental agreement, which was language incorporated in the agreement. He testified that the term experimental meant that no one signing the agreement had an obligation to continue with it following its expiration. Hanson testified that one of the reasons the MAA

withdrew from the multiemployer negotiations for the Live Recording Agreement was project by project approval language the AFM was seeking in the agreement, which the MAA thought would constitute an impediment for employers signing the agreement to reach a deal with record companies necessary for the production of CDs relating to the live recordings under the agreement.

Hanson’s testimony reveals during the 2006 Trade Agreement negotiations with Local 4, the MAA agreed with Local 4 to undertake nine preapproved recording projects. It was on this basis that the MAA felt they overcame the problems they foresaw in the project by project approval language incorporated in the AFM’s Live Recording Agreement. Hanson testified the MAA then agreed, at the request of Local 4, to sign the Live Recording Agreement pertaining to those nine projects. Hanson testified it was the MAA’s intention to sign the AFM’s Live Recording Agreement for convenience to set the terms and conditions that would govern the recordings the MAA agreed to with Local 4. Hanson testified the MAA was clear with Local 4 that the signing of the Live Recording Agreement was not in any way binding on the MAA to sign any successor agreement beyond the expiration of the agreement. The “Memorandum of Agreement” signed by the MAA on January 10, 2007 binding the MAA to the Live Recording Agreement, and separately by the Cleveland Orchestra Committee and Local 4, on January 11, 2007, states that “Upon the execution of this Memorandum of Agreement, MAA will become signatory to the ‘National Recording Agreement’ for the purposes of producing said projects. There is no expression of intent by MAA, upon expiration of the National Recording Agreement in August of 2009, to sign any successor agreement. . . .”

However, Hanson acknowledged the MAA’s agreement with Local 4 to sign the AFM’s Live Recording Agreement did not reflect the AFM’s intent pertaining to the MAA’s signing the Live Recording Agreement because the AFM was not a party to the memorandum of agreement between the MAA and Local 4. Hanson signed an acceptance of the AFM’s Live Recording Agreement on January 27, 2007, wherein it states the MAA, as the Employer, “has read, understands and voluntarily accepts and adopts”. . . “each and every provision” of the Live Recording Agreement, which is in full force and effect from July 14, 2006, to July 13, 2009. As set forth above, The Live Recording Agreement contained a recognition clause of the AFM. Thus, despite any side agreement that the MAA had with Local 4, the MAA along with several other orchestra’s signed the AFM’s Live Recording Agreement declaring that the AFM was the exclusive collective-bargaining representative of the MAA’s musicians for media matters covered by the Agreement. The fact that the MAA signed the Live Recording Agreement, as Hanson contends at the request of Local 4, only serves to confirm the MAA was aware that Local 4 and the AFM had by agreement declared certain matters for local negotiation with Local 4, and other matters for national negotiations with the AFM. Moreover, the MAA was historically a participant in this bifurcation of areas of negotiation in that it was previously signed project recording agreements with the AFM, the AFM’s Internet Agreement, and the AFM’s AV and now Live Recording Agreements. The latter two by their terms stating the AFM

was the exclusive representative of the MAA's musicians for certain media matters.

This recognition by the MAA of the AFM was part of an industry pattern of national negotiations with the AFM and local negotiations with Local 4 that continued when the MAA was party to multiemployer bargaining with the AFM from November 2007 until May 9, 2009. This bargaining was initially aimed at negotiating a successor agreement to the AV Agreement that was effective from February 1, 2006 to January 31, 2008. During the course of the negotiations the parties agreed to negotiate a comprehensive agreement with the AFM replacing the AV, Internet, and Live Recording agreements. Throughout the bargaining the employers involved, including the MAA, bargained through the MMC. Hanson served as chairman of the MMC throughout the referenced bargaining. The bargaining ended on May 9, 2009, without an agreement being reached. Foster credibly testified that, during the November 2007 to May 2009 negotiations, there was some discussion at the end of including radio broadcasts in what was to be a comprehensive media agreement. At the time, the discussions were about consolidating existing AFM media agreements into one agreement, along with radio. He testified there was agreement, before the talks broke down, to include radio into the master agreement. Foster testified the topics the AFM bargained over during these negotiations were encompassed in the AV, Live Recording, and Internet agreements. Foster testified there were 40 or 50 employers in the employer association before it broke up. Foster explained the AFM negotiations with the MMC started out as discussions for a successor to the AV Agreement, but transformed into negotiations for a new Integrated Media Agreement to include all symphonic media under one consolidated agreement. Similarly, Hanson testified he chaired the MMC throughout those negotiations and he negotiated on terms to replace the Internet and Live Recording Agreements. Noting its extensive bargaining history with the AFM, it is apparent that the MAA acknowledged the AFM's recognition of its employees for certain media matters, and when it was in its interest to do so sought, in a leadership role, along with other employers, to negotiate a comprehensive national media agreement with the AFM.

When the MAA concluded it could not get a national media agreement with the AFM to its liking it took another tact. By letter dated August 10, 2009, Attorney Buck, writing for the MAA informed the AFM president that the MAA no longer intended to bargain on a multiemployer basis. By letter dated August 13, attorneys for the AFM made a demand for the MAA to bargain with the AFM for successor agreements to the AV, Internet, and Live Recording agreements, stating that those agreements remained in effect with the MAA until successor agreements with the AFM were negotiated and that the dissolution of the multiemployer association did not relieve the MAA of its duty to bargain with the AFM over media topics covered by those agreements. Buck responded by letter dated August 17, that the MAA intends to bargain with Local 4 over media matters. The exchange of correspondence continued and by letter of September 9, 2009, Buck informed AFM attorney Freund that "the MAA has no desire or interest in bargaining the (AFM), and declines to do so."

The MAA and Local 4 began negotiations for a successor Trade Agreement on June 1, 2009. During the negotiations for a successor Trade Agreement, the MAA made a comprehensive proposal on electronic media to Local 4 that included proposals both on matters covered by the Local 4 Trade Agreement set to expire on August 30, 2009, and on matters covered by the AFM's AV, Internet, and Live Recording Agreements. In response to MAA's proposals on electronic media, Local 4 took the position the AFM was the recognized bargaining representative on media issues and any bargaining on those issues should be conducted with the AFM. Local 5 President Di Cosimo testified that when Local 4 collectively bargains he attempts to give effect to the division of representation between Local 4 and the AFM. The MAA made a proposal during the January 6, 2010 bargaining session for a successor Trade Agreement. Di Cosimo testified there were parts of the proposal, mainly contained in item 4, which he did not consider Local 4 to have authority to bargain over. He testified Local 4 did have the authority to bargain over radio broadcasts relating to the 36-week guarantee included in section 12.3.a of the Trade Agreement, which the MAA sought to eliminate in its proposal. Di Cosimo testified article 12.3.c is part of the radio guarantee section of the Trade Agreement, which is something Local 4 can bargain over. Di Cosimo testified article 12 of the Trade Agreement refers to and has been applied to radio broadcasts. He testified it has not been applied to any other type of broadcast to his knowledge. Di Cosimo testified Local 4 did not have the authority to strike AFM references from the Trade Agreement, or to discuss broadcast streaming or other media matters outside Local 4's jurisdiction which the MAA had included in its proposal. Di Cosimo testified media matters that go national or international are matters for the AFM. Di Cosimo testified the 2006 to 2009 Trade Agreement contains references to AFM agreements and rights, and those references remained in the Trade Agreement when it was extended and modified in January 2010. Di Cosimo testified that it was his view that the MAA being a party to the AV, Internet, and Live Recording agreements recognizing the AFM as the bargaining agent precluded Local 4 from bargaining on those subjects. Di Cosimo testified Local 4's position has consistently been for the MAA to approach the proper representative of the AFM pertaining to those issues. Di Cosimo testified if bargaining about it came up he would call the AFM for direction. By memorandum dated January 19, 2010, the MAA, Local 4 and the Cleveland Orchestra Committee renewed and modified the 2006 Trade Agreement with new effective dates of August 31, 2009, to September 2, 2012.

Representatives of Local 4 and the AFM met with MAA on March 1 and May 10, 2010, to bargain regarding electronic media topics. During these negotiations, the MAA maintained its position that it owed no bargaining obligation to the AFM but was willing to bargain with its representatives as representatives of Local 4, while the AFM maintained its position that MAA's bargaining obligation regarding these media matters was to the AFM, not Local 4. The negotiations did not result in an agreement. During the negotiations on those dates, the AFM presented, as part of its proposal a document entitled, the "Integrated Media Agreement." Foster testified that during

these negotiations the AFM representatives stated that under the national media agreements the MAA was the exclusive bargaining representative for topics covered under those agreements. Ginstling testified he attended what he referred to as two nonbinding meetings, which were held at Ginstling's suggestion. Ginstling testified there were a number of discussions about the AFM's bargaining role to which the MAA asserted the media issues should be part of their Local Trade Agreement and AFM insisted the MAA had an obligation to bargain with the AFM as the exclusive bargaining representative on media matters.

Ginstling testified that, during the 2-year period in which he was the general manager of the MAA which would have begun around September 2008, the MAA has either been party to the Internet, Live Recording, and AV agreements or has been living under their terms. In fact, on February 24, 2010, Ginstling sent a memo to the musicians of the Cleveland Orchestra, entitled "February 2010 Electronic Media Projects" informing them the MAA would pay for 3 additional weeks of media projects in February 2010 in accordance with the AFM's AV and Live Recording agreements. The Ginstling memo stated a pension payment would also be made to the AFM/EPF, and any subsequent payments would be made to the musicians on a revenue sharing basis in accordance with the AV Agreement. The AV and Live Recording agreements had, by their terms, expired as of January 31, 2008, and July 13, 2009, respectively. Ginstling also testified that during the summer of 2010, the MAA had been in negotiations to release a CD recording of a performance the Cleveland Orchestra had given at the Salzburg Festival in Austria in 2008. The MAA initially quoted to the Festival the cost of the CD under the AFM's Live Recording Agreement, although eventually no agreement was reached to do the CD with the Festival. Hanson also testified when it came to releasing a recording of the Salzburg Festival performance the first thing the MAA looked to was the terms of the Live Recording Agreement. Thus, I do not find Hanson's testimony that the MAA no longer considers itself to be bound by the Live Recording Agreement, but uses it for convenience to be particular convincing. This is so, given Ginstling's testimony that the MAA was living under four agreements including the Live Recording Agreement, as well as the MAA's actions in applying the Live Recording Agreement and the AV Agreement as late as February 2010, and its statement to the musicians that it would do so in future. Hanson's testimony that the MAA has choices in the area of media activity as to which agreement they employ in pursuing a particular media project and they can play these choices out with their employees as they see appropriate is also in derogation of the MAA's bargaining obligation to both the AFM and Local 4.

In sum, while the MAA had signed a collective-bargaining agreement stating Local 4 was the exclusive representative of its employees, beginning in 1982 the MAA, either through participation individually or in multiemployer bargaining has engaged in negotiations with the AFM pertaining to certain media matters. This bargaining has resulted in the MAA signing three separate media agreements with the AFM, the AV, Live Recording and Internet agreements. Two of these agreements, the AV and Live Recording agreements designated the

AFM as the exclusive representative for the employees for the matters covered by the agreements. The three agreements were part of a pattern of industry bargaining with the AFM, of which the parties had separated out national media issues to be covered by the AFM agreements and local issues to be covered by local collective-bargaining agreements. In fact, the AFM agreements included references to local collective-bargaining agreements and made them a condition precedent for the national agreements to apply. Local 4's Trade Agreements with the MAA also included deferential language to the AFM's rules and procedures on particular matters. The MAA's recognition of the AFM as the collective-bargaining representative for national media issues continued from November 2007 through May 9, 2009, during which the MAA was party to multi-employer bargaining with the AFM concerning a national integrated media agreement. It was only after those negotiations broke down that the MAA then pursued an integrated media agreement with Local 4, and presented proposals to Local 4 covering media issues related to matters theretofore covered by the AFM's national media agreements. The MAA also unsuccessfully sought to have certain references of the AFM related to media matters removed from Local 4's Trade Agreement. Local 4, in consult with the AFM, refused to negotiate on media matters with the MAA, which Local 4 considered within the province of the AFM. When a new Trade Agreement was negotiated the past references to the AFM remained in the agreement. The MAA then offered to meet with Local 4 and the AFM in "nonbinding" discussions pertaining to media matters. Ginstling testified even these discussions from the MAA's perspective were that the AFM was only to appear there as a representative of Local 4. Thus, by letter of September 9, 2009, Buck had written to the AFM's counsel that the MAA has no desire to bargain with the AFM, and declines to do so.

I conclude the history of bargaining, the recognition provisions in the AFM's agreements, the industry practice, the AFM's by laws, and the language in Local 4's Trade Agreement relating to the AFM shows that the MAA has recognized Local 4 and the AFM as joint representatives of employees in the designated bargaining units covered by their agreements. See *Vermont Marble Co.*, 301 NLRB 103 (1991); *Tree-Free Fiber Co.*, 328 NLRB 389, 398 (1999); *Ozanne Construction Co.*, 317 NLRB 396 (1995), enfd. 112 F.3d 219 (6th Cir. 1997); *CBS Broadcasting, Inc.*, 343 NLRB 871, 872 (2004); *Reynolds Metal Co.*, 310 NLRB 995 (1993); *M & M Transportation Co.*, 239 NLRB 73, 76 (1978); and *General Electric Co.*, 150 NLRB 192, 193 (1964), enfd. 418 F.2d 736, 755 (2d Cir. 1969), cert. denied 397 U.S. 965. Moreover, the parties to these agreements, including the MAA, Local 4, and the AFM were keenly aware that there had been a division of representation between the AFM and Local 4 relating to national and local media issues. Thus, I find that the MAA violated Section 8(a)(1) and (5) of the Act, by its September 9, 2009 refusal to negotiate with the AFM pertaining to media issues for which it had theretofore bargained with that union. I do not find the MAA's attempts to engage in bargaining with Local 4 over those issues or subsequent attendance of nonbinding discussions with Local 4 and the AFM relieves the MAA of its bargaining obligation to negotiate with the AFM directly pertaining to certain media

matters. See *General Electric Co.*, supra. Finally, I do not find that the AFM labeling itself as the exclusive collective-bargaining representative with respect to certain media matters serves to vitiate its joint representative status with Local 4. The evidence clearly reveals that the two unions served as joint representatives, as they acknowledged the scope of each other's negotiation parameters and included reference to the other union in their respective collective-bargaining agreements.

The MAA argues in its brief that its current Trade Agreement with Local 4 contains an exclusive recognition clause for Local 4, and that articles 12 and 13 of the agreement are devoted to media provisions that include the recording and broadcasting of orchestra concerts over the radio and internet, the use of recordings and videotapes for promotional purposes, the creation of recorded albums, and the exploitation of the Orchestra's archival catalogue of recordings. The MAA argues that Local 4 is the exclusive representative of the musicians of the MAA, including media matters. The predecessor to the current Trade Agreement was in effect from September 4, 2006, to August 30, 2009. It also contained articles 12 and 13 that the MAA cites in its brief.<sup>7</sup> Yet, the MAA was signatory to multiple AFM AV Agreements, the most recent agreement effective from February 1, 2006, to January 31, 2008. By letter of acceptance dated, January 27, 2007, the MAA became signatory to the Live Recording Agreement, which by its terms was effective from July 14, 2006, through July 13, 2009, between the AFM and the MMC. The MAA then engaged in multiemployer bargaining through the MMC with the AFM from November 2007 until May 9, 2009. This bargaining was initially aimed at negotiating a successor agreement to the AV Agreement that had expired on January 31, 2008. During the course of the negotiations the parties agreed to negotiate a comprehensive agreement replacing the AV, Internet, and Live Recording agreements. Hanson served as chairman of the MMC throughout the referenced bargaining. Thus, the MAA engaged in media related bargaining and recognition of the AFM while the provisions of the Trade Agreement, which it now claims present a conflict to the AFM's recognitional status, were in effect. In fact the MAA continues to apply the AFM's AV and Live Recording Agreement as announced in its February 2010 memo to musicians, and confirmed by the testimony of Ginstling and Hanson.

The MAA's current claims in its brief that it entered into its agreements with the AFM as the AFM serving as a representative of Local 4 are not substantiated by the record. The MAA was signatory to the initial AFM AV Agreement effective from 1982 to 1984, and each successor AV agreement including the most recent effective from February 1, 2006, to January 31, 2008. The 2006 AV Agreement contains a recognition clause by the signatory orchestras of the AFM as the exclusive representative of the orchestras' musicians for audio visual activities covered by the agreement. There was no evidence presented that the MAA signed this agreement with the AFM as a repre-

sentative of Local 4. While the AFM's Internet Agreement with the AFM was labeled experimental, there was also no evidence that the AFM entered this agreement with the MAA with the AFM being a representative of Local 4. The MAA did sign the AFM's Live Recording Agreement pursuant to an Agreement with Local 4 to do so. However, the Live Recording Agreement was between the AFM and the MAA, and there is nothing in that agreement which would indicate the AFM entered the agreement as a representative of Local 4.

I do not find the MAA's claims of a conflict created by its dual recognitional status of the AFM and Local 4 to be convincing in view of its bargaining history. Rather, I find the parties here are quite sophisticated and are keenly aware of the parameters and applications of the AFM national agreements and Local 4's Trade Agreement, the commercial side of the latter for the most part being tied to local radio broadcasts and internet distribution related to those broadcasts. Di Cosimo, Ginstling, and Hanson all referred to the media provisions in the Trade Agreement as related to the radio guarantee. In fact, the AFM's current Integrated Media Agreement contains certain exclusions including local radio and television broadcasts. Rather, I have concluded that the MAA's leadership, after participating in failed national negotiations along with other orchestras with the AFM, sought to get a better deal than it thought it could get from the AFM by shifting those negotiations to a local basis with Local 4. As a result, the MAA sought to shed its prior recognition of the AFM and by this action I have found it violated Section 8(a)(1) and (5) of the Act.

Similarly, I do not find as persuasive the MAA's contention of a conflict created by the fact that the AFM's proposed Integrated Media Agreement contains a recognition clause and a union security clause. In this regard, when it was in its interest to do so, the MAA signed the AFM's AV and Live Recording Agreements granting the AFM exclusive recognition pertaining to media matters covered to those agreements, and those agreements also contained union-security clauses. The MAA entered into these agreements despite its longstanding recognition of Local 4, and having union-security clauses in its Trade Agreements with Local 4 as the 1967 to 1970 Trade Agreement with Local 4 contains a recognition and union-security provision. The MAA also argues that article 35 of the AFM's Integrated Media Agreement seeks to overrule the no-strike clause of the MAA's Trade Agreement with Local 4. Even if that were to be the case, there is no requirement that the MAA agree to this or any other provision of the AFM's Integrated Media Agreement. Rather, the only requirement is that the MAA bargain in good faith with the AFM pertaining to certain media related matters for which it has previously recognized the AFM as the collective-bargaining representative. The MAA's argument that there cannot be two exclusive collective-bargaining representatives demanding separate collective-bargaining agreements is undermined by the fact that over the years it has a history of signing separate collective-bargaining agreements with the AFM and Local 4, that it has recently bargained separately with the AFM about certain media related matters, and that the MAA continues to apply the terms and condition of the AFM's media agreements to its employees. The MAA's con-

<sup>7</sup> How far those provisions went back in prior Trade Agreements in their current or prior forms is unclear on this record. The 1967 to 1970 Trade Agreement is in evidence and it contains articles 25 to 29 under the heading of "Broadcasts, Telecasts and Recording."

tention that the AFM's labels itself as exclusive collective-bargaining representative about certain media matters rather than stating it is a joint representative with Local 4 is an argument raising form over substance. Both the AFM and Local 4 acknowledge the existence of the other in their respective collective-bargaining agreements, and in the AFM's bylaws. It is clear here that the unions are working together as joint representatives of the MAA's employees, and the MAA has been informed of such when Local 4 officials repeatedly refused to negotiate with the MAA about media matters within the province of the AFM.

I do not find *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 687 (1944), cited by the MAA to require a different result. There a respondent employer was found to have violated the Act by engaging in direct dealing with employees and using as justification for its refusal to bargain with a union the defection of union members which the employer had induced by unfair labor practices. I do not find the Court's pronouncements there that the employees could have only one collective-bargaining representative to be applicable here. Rather, the MAA has recognized over time the AFM and Local 4 to be joint bargaining representatives of its employees. This is not a case where Respondent MAA seeks to select between competing unions, or is engaging in direct dealing with its employees. In this instance an international and local union are working together as joint representatives to represent a bargaining unit. Combined they are the exclusive representative of employees and this practice has been condoned by the Board as set forth above.

I also do not find *Oakwood Care Center*, 343 NLRB 659 (2004), cited by the MAA controlling here. There the Board concluded that a combined unit of solely and jointly employed employees contravenes Section 9(b) of the Act by requiring different employers to bargain together regarding employees in the same unit. The Board held that such combined multiemployer units are permissible only with the parties consent. The Board noted such a combined unit with two different employers each only controls a portion of the terms and conditions of employment of the unit employees, and such a structure subjects employees to fragmented bargaining and inherently conflicting interests. The Board cited examples of how the bifurcation of bargaining wherein there are two employers regarding employees in the same unit hampers the give-and-take process of negotiation between a union and an employer, and places the employers in the position of negotiating with one another as well as with the union. However, in the instant case there is only one employer which is cognizant and in control of the full arena of the terms and conditions of its employees working conditions. Moreover, here the separation of bargaining functions between the AFM and Local 4 has been part of a longstanding industry practice in which the MAA has voluntarily participated in that is signed an abided by simultaneous collective-bargaining agreements with the AFM and Local 4 recognizing each as the exclusive collective-bargaining representative for matters covered by those agreements. In fact, in 2009 the MAA not only participated in but lead a group of employers in multiemployer bargaining with the AFM to seek an across the Board agreement on certain media matters. When it could not get an agreement to its liking the MAA withdrew from mul-

tiemployer bargaining with the AFM, and sought to compel Local 4 to bargain about matters the MAA had theretofore bargained with the AFM. It appears the MAA is only opposing the AFM's joint recognitional status because it could not get an agreement to its liking with the AFM.

In *Chicago Magnesium Castings*, 256 NLRB 668 (1981), cited by the MAA, a local union had been the collective-bargaining representative of an employer's employees since 1970. The employer became a member of an employer's association in 1973 and as a result became a party to the employer association's collective-bargaining agreement with the local union's parent body. The employer subsequently withdrew from the employer association and the Board held based on a charge filed by the local union that the local union retained bargaining rights based on the employer's contract through the employer association with the local union's parent body. I do not find this case, cited by the MAA, to constitute precedent for the matters before me. In this regard, the issue as to the recognitional status of the local union's parent body vis a vis that of the local union was not presented to the Board there. *Newell Porcelain Co.*, 307 NLRB 877 (1992), review denied 986 F.2d 70 (4th Cir. 1993), cited by the MAA, is also inapposite to the facts herein. In *Newell* an independent union was certified as the employees' bargaining representative following a Board election. Negotiations for an initial contract were unproductive, and as a result the independent union affiliated as a local union with the United Electrical Workers, whose representatives began to attend negotiations. The UE then attempted to supplant the affiliate as the collective-bargaining representative, but the respondent employer was only willing to recognize the prior independent union as an affiliate of the UE, and not the UE as the collective-bargaining representative. The Board held the employer had no obligation to recognize the UE as the exclusive bargaining representative of the employees. In the instant case, the MAA has bargained with the AFM for many years, and has signed contracts recognizing the AFM as the exclusive collective-bargaining representative for certain media matters. Thus, a strong bargaining history exists here wherein the MAA has recognized the AFM and Local 4 as joint representatives, where each has represented the MAA's employees with respect to certain agreed upon matters between Local 4 and the AFM.

#### CONCLUSIONS OF LAW

1. Respondent, the Musical Arts Association (MAA), is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. American Federation of Musicians of the United States and Canada, AFL-CIO/CLC (the AFM) and the Cleveland Federation of Musicians, Local 4 of the American Federation of Musicians of the United States and Canada, AFL-CIO/CLC (Local 4) are each labor organizations within the meaning of Section 2(5) of the Act.

3. The AFM and Local 4 are joint representatives of the MAA's employees in a unit appropriate for collective-bargaining within the meaning of Section 9(b) of the Act as described in their respective present and/or past collective-bargaining agreements with the MAA, which includes all musi-

cians employed by the Cleveland Orchestra.

4. The MAA's recognition of Local 4 has been embodied in successive collective-bargaining agreements, the most recent of which is effective from August 31, 2009, to September 2, 2012.

5. The MAA's recognition of the AFM has been embodied in successive collective-bargaining agreements, the most recent of which included the following: Symphony, Opera or Ballet Orchestra Audio-Visual Agreement (the AV Agreement), effective February 2, 2006, to January 31, 2008; the Symphony, Opera or Ballet Orchestra Internet Agreement (the Internet Agreement), effective February 2, 2000, to March 31, 2005; and the Symphony, Opera or Ballet Orchestra Live Recording Agreement (the Live Recording Agreement), effective July 14, 2006, to July 13, 2009.

6. Local 4 is responsible for bargaining with the MAA regarding terms and conditions of unit employees relating to live performances, rehearsals for live performances and local television and radio broadcasts.

7. The AFM is responsible for bargaining with the MAA regarding terms and conditions of unit employees pertaining to matters covered by the AV, Internet, and Live Recording agreements such as the production and use or development of electronic media including CDs, DVDs, digital recording and the Internet.

8. By on September 9, 2009, withdrawing recognition of the AFM as the joint exclusive representative concerning media related matters covered by the AV, Internet, and Live Recording agreements described above in paragraph 4, and stating its intention to bargain only with Local 4 over all matters, the MAA has violated Section 8(a)(1) and (5) of the Act.

9. By since September 9, 2009, failing and refusing to recognize and bargain with the AFM as the joint exclusive representative of the unit with regard to media and other matters covered by the AV, Internet, and Live Recording agreements, the MAA has violated Section 8(a)(1) and (5) of the Act.

#### THE REMEDY

Having found that Respondent violated Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist and that it take certain affirmative action necessary to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>8</sup>

#### ORDER

The Respondent, The Musical Arts Association, Cleveland, Ohio, its officers, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize the American Federation of Musicians of the United States and Canada, AFL-CIO/CLC (the AFM) and the Cleveland Federation of Musicians, Local 4 of the American Federation of Musicians of the United States and Canada, AFL-CIO/CLC (Local 4) as the

<sup>8</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

joint collective-bargaining representative of the established unit of musicians employed as members of The Cleveland Orchestra, with Local 4 having authority to bargain over the terms and conditions of employment related to live performances, rehearsals for live performances, local television and radio broadcasts; and the AFM having authority to bargain over the terms and conditions of employment pertaining to matters covered by the AFM's AV, Internet, and Live Recording agreements such as the production and use or development of electronic media including CDs, DVDs, digital recording and the Internet.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain in good faith with the AFM as the joint exclusive bargaining representative of the established unit of musicians employed by the Cleveland Orchestra pertaining to matters covered by the AFM's AV, Internet, and Live Recording agreements such as the production and use or development of electronic media including CDs, DVDs, digital recording and the Internet, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its Cleveland, Ohio facility, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 9, 2009.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

<sup>9</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize the American Federation of Musicians of the United States and Canada, AFL-CIO/CLC (the AFM) and the Cleveland Federation of Musicians, Local 4 of the American Federation of Musicians of the United States and Canada, AFL-CIO/CLC (Local 4) as the joint collective-bargaining representatives of the established unit of musicians employed as members of The Cleveland Orchestra, with Local 4 having authority to bargain over the terms and conditions of employment related to live performances, rehearsals for live performances, local television and radio

broadcasts; and the AFM having authority to bargain over the terms and conditions of employment pertaining to matters covered by the AFM's: Symphony, Opera or Ballet Orchestra Audio-Visual Agreement (AV Agreement); Symphony, Opera or Ballet Orchestra Internet Agreement (Internet Agreement); and the Symphony, Opera or Ballet Orchestra Live Recording Agreement (Live Recording Agreement) such as the production and use or development of electronic media including CDs, DVDs, digital recording and the Internet.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights.

WE WILL, on request, bargain in good faith with the AFM as the joint exclusive bargaining representatives of the established unit of musicians employed by the Cleveland Orchestra pertaining to matters covered by the AFM's AV, Internet, and Live Recording Agreements such as the production and use or development of electronic media including CDs, DVDs, digital recording and the Internet, and if an understanding is reached, embody such understanding in a signed agreement.

THE MUSICAL ARTS ASSOCIATION