UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COLORADO SYMPHONY ASSOCIATION

and **Case No. 27-CA-195026**

DENVER MUSICIANS ASSOCIATION
LOCAL 20-623, AMERICAN FEDERATION
OF MUSICIANS

CHARGING PARTY'S ANSWERING BRIEF TO THE EXCEPTIONS

Pursuant to NLRB Rule 102.46, the Charging Party, Denver Musicians Association Local 20-623 (DMA), submits the following Answering Brief to the Exceptions filed in this matter on or about December 18, 2017. Administrative Law Judge Jeffrey Wedekind issued his decision on November 20, 2017.

I. Issue

1. Whether the NLRB must affirm the factual findings in ALJ Wedekind's decision of November 20, 2018, while according great weight to those findings.

2. Whether the NLRB must affirm ALJ Wedekind's legal rulings as consistent with Board law.

II. Facts

The Colorado Symphony Association (CSA) has recognized the DMA as the exclusive collective bargaining representative for the contract musicians employed at the Colorado Symphony Orchestra. (Jt. Ex. 1 p. 2, 1 ALJD) The most recent collective bargaining agreement expired on June 30, 2015. (Tr. 35, 1 ALJD) The parties are currently negotiating for a new agreement and have not reached impasse. (Tr. 36)

The DMA bargains a base rate of pay for all musicians. (Tr. 36, Jt. Ex. 1 Article IV p. 6) Additionally, each musician has the right to negotiate for an individual contract, which can

contain “overscale … and/or other terms and conditions of employment more favorable than those contained” in the collective bargaining agreement. (Tr. 36, Jt. Ex. 1 Article XVI p. 35) Nothing in the agreement limits the right of the DMA to assist members of the bargaining unit by obtaining information from the CSA, which bears upon those individual negotiations.

Early in 2016, Ms. Brook Ferguson, principal flutist in the Colorado Symphony Orchestra, engaged the services of attorney John McKendree to correspond with the CSA regarding deficiencies in her individual contract for the 2016/2017, season. (Resp. Ex. 2, 4 & 5, 2 ALJD 1-15) In letters written to officials of the Symphony, Mr. McKendree complained that the overscale compensation paid to the principal bassoonist and French horn players demonstrated discrimination against her. (Resp. Ex. 2 p. 1, Resp. Ex. 4 p. 3 and Resp. Ex. 5 p. 1, 2 ALJD 1-15)

Ms. Ferguson and the CSA had not resolved their disagreement regarding that individual contract when in November 2016 the CSA personnel manager summoned Ms. Ferguson to discuss an interaction between her and a Symphony conductor that had occurred during a rehearsal in October of 2016. (Tr. 144, 2 ALJD 16-20) The parties agreed on November 18, 2016, as the date for that discussion. (Tr. 61) In preparation for that meeting, undersigned counsel, the President of the DMA, and Brook Ferguson met on November 14, 2016. (Tr. 44-45) In the preparation meeting, Ms. Ferguson stated that management not only misjudged and mistreated her respecting the October rehearsal incident it also inequitably treated her with respect to her individual contract. (Tr. 45-48) Since the union lacked precise data at the meeting of November 14th on the pay received by the musicians in the orchestra with whom Ms. Ferguson could compare herself, counsel suggested asking for the information. (Tr. 50) At that November 14, 2016, meeting, Ms. Ferguson also advised that she was considering an EEOC

claim against the CSA and that she had hired Mr. McKendree to represent her in that claim. (Tr. 50)

On January 4, 2017, the DMA, through counsel, requested from the CSA, copies of the individual contracts of all principal wind and brass players for the three consecutive seasons beginning in 2014/15. (Jt. Ex. 2)[1] The DMA sought the information both to provide guidance to Ms. Ferguson on her proposal for an individual contract for the 2017/18, season (Tr. 55) and to investigate potential wage inequities and to police and administer the contract. (Jt Ex. 4 p. 2)

Article XVI required her to submit that proposal to management by February 1, 2017. (Tr. 55) Therefore, Jt. Ex. 2 requested production of the individual contracts within 20 days of January 4, 2017, in time to inform Ms. Ferguson's proposal for an individual contract. (Tr. 55)

Counsel for the DMA conveyed the January 4, 2017, request for information by email to Mr. Scully, counsel for the CSA. (Tr. 52 & Jt. Ex. 2) Both Mr. Scully and CEO Jerry Kern responded by email the same day, Mr. Scully requesting an explanation of the relevance of the request in writing, and Mr. Kern requiring the legal basis for the request. (Jt. Ex. 3) Undersigned counsel responded by letter dated January 9, 2017, stating that the request is relevant "to potential wage inequities and the policing and administration of the contract…" (Jt. Ex. 4) As to the legal basis for the request, DMA counsel cited several cases holding that employers must provide personal service or individual contracts despite the fact that the union did not participate in their negotiation. (Jt. Ex. 4)

On January 16, 2017, Mr. Scully responded, refusing to provide the requested individual contracts. (Jt. Ex. 5) As grounds for this refusal, he asserted, "the musician seeks the requested

[1] It also sought the original hire dates of persons for whom the employer produced individual contracts, and the employer provided that information, so that request is not at issue in this proceeding. (Tr. 52)

information solely for the purpose of pursuing litigation against the CSA." (Jt. Ex. 5)

On January 18, 2017, Ms. Ferguson filed a charge with the Equal Employment Opportunity Commission, alleging discrimination based upon sex and the Equal Pay Act of 1963, as amended. (Jt. Ex. 3) The DMA filed the unfair labor practice charge in this matter on March 17, 2017. Ms. Ferguson has taken an unpaid sabbatical for the entire 2017/18 season so the parties did not try to negotiate an individual contract for the current fiscal year. (Tr. 140 & Jt. Ex. 1 §12.12) On June 27, 2017, Ms. Ferguson amended her EEOC charge alleging retaliation. (Resp. Ex. 1)

The collective bargaining agreement delineates the role of the Orchestra Committee in the administration of the CBA. (Jt. Ex. 1, Article 13.2 p. 27) The record reflects no agreement between the Orchestra Committee and the CSA regarding the confidentiality of the individual contracts.

III. Argument

a. The Board Should Not Disturb the Findings of the ALJ Since They Expressly Rely on the Credibility of the Witnesses.

The Board has a longstanding policy of according great weight to the findings of Administrative Law Judges, especially when those ALJs base their findings on the credibility of the witnesses. In *Standard Dry Wall Products, Inc.* 91 NLRB 544, 545 (1950) The Board stated,

> … as the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the Trial Examiner, but not the Board, has had the advantage of observing he witnesses while they testified, it is our policy to attach great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor."

The ALJ expressly based his findings on the demeanor of the witnesses, among other factors. (ALJD p. 1 fn 1) The record contains prodigious testimony, which supports his findings

that the DMA had a plethora of justifications for seeking the individual contracts other than the phony one seized upon by the CSA, purported assistance of Brook Ferguson in her EEOC claim.

For example, the ALJ credited the testimony of DMA's attorney that he told Ferguson that he could not represent her in her EEOC case, and that the Union did not, in fact help her with her case. (8 ALJD, 24-26) That finding, based upon testimony at the hearing, (Tr. 45-49, 51, 61) by itself rebuts the CSA's main theory that help with the EEOC charge solely motivated the DMA's information request.

Furthermore, the ALJ properly credited DMA counsel's description of the discussion with CSA's counsel on May 15, 2017, in which the former told the latter that while Ferguson's report to the DMA of discrimination "was the instigation of" the Union's information request, the ultimate purpose was to open information on individual contracts to all members of the bargaining unit. (8 ALJD 28-29, Tr. 59) If this information request ultimately succeeds, that success will enable other musicians to approach the DMA to request further information to advance their individual bargaining under Article XVI of the CBA. (Jt. Ex. 1 p. 35)

The ALJ justifiably declined to adopt the CSA's "sole motivation /EEOC" theory because of its meager support in the record. For example, the CSA seeks to bolster that theory by erroneously positing that the DMA's information request seeks the "**exact** information Ms. Ferguson had explicitly asserted she needed for her private litigation." (CSA Brief p. 7, emphasis in original) In fact, Mr. McKendree relied upon the overscale "historically provided to the male Principle (sic) French horn and Principle (sic) Bassoonist," in asserting unfairness and discrimination. (R. Ex. 2 p. 1. See also R. Ex. 4 p. 3 and R. Ex. 5 p. 1) McKendree never sought any information in behalf of Ms. Ferguson for her "private litigation." In any event, the DMA's request does not correspond with the section principals cited in McKendree's letters,

because the DMA sought the individual contracts of all principals in woodwinds and brass, a request that encompasses far broader information than McKendree referred to in his assertions of discrimination based upon the principals only for French horn and bassoon. (Jt. Ex. 2) [2]

The record amply supports the ALJ's decision that the DMA did not seek information on January 4, 2017, solely to assist Ms. Ferguson in her EEOC case. The Board must attach great weight to his findings on that issue and affirm them.

b. The ALJ Correctly Determined that the CSA Failed to Satisfy Its Burden to Show the Irrelevance of DMA's Information Request to its Bargaining Duties.

Most remarkably, the CSA's brief avoids any citation or discussion of the considerable body of law spanning several decades, which governs the outcome here. The NLRB has uniformly held in the entertainment industry that employers must produce overscale contracts to the union although they individually negotiate those contracts with the entertainer. Board law regards such contracts as presumptively relevant to the union's bargaining duties, as they contain information regarding wages, a core mandatory subject of collective bargaining. The CSA ignores that body of law because it dooms CSA's fate in this case.

The ALJ correctly cited and relied upon that body of law. (See 7 ALJD 2-6) The cases include *Retlaw Broadcasting Co*., 324 NLRB 138, 141 (1997), enfd. 172 F.3d 660 (9th Cir. 1999); *King Broadcasting Co*., 324 NLRB 332, 336–337 (1997); *WXRK*, 300 NLRB 633, 635–636 (1990); *WCCO Radio*, 282 NLRB 1199, 1204 (1987), enfd. 844 F.2d 511 (8th Cir.), cert.

[2] As the ALJ points out in footnote 3 on page 2 of his decision, the expired CBA defines principals as the first chair position in a number of sections in the orchestra including eight woodwind and brass positions, flute, oboe, clarinet, bassoon, horn, trumpet, trombone and tuba. In his letters, Mr. McKendree referred to only two of those principals, bassoon and horn. The DMA's information request asked for the individual contracts for "all principal wind and brass players." (Jt. Exhibit 2) Thus, the DMA request sought the PSAs for oboe, clarinet, trumpet, trombone and tuba, which McKendree did not mention.

denied 488 5 U.S. 824 (1988); *Detroit News*, 270 NLRB 380, 381–382 (1984), enfd. mem. 759 F.2d 959 (D.C. Cir. 1985); and *Radio Station WLOL*, 181 NLRB 560, 561 (1970). *Cowles Communications*, 172 NLRB 1909 (1968) could be added to the list.

These cases establish at least two fundamental principles. First, employers must produce individual contracts since they contain information regarding wages and other mandatory subjects of bargaining. The individual contracts referenced in the DMA's January 4, 2017, request contained information relating to "overscale," defined in Joint Exhibit 1, §4.1C as "a salary greater than base salary." Wages of unit employees bear directly on a mandatory bargaining subject, and are presumptively relevant. *Evening News Association*, supra at 381. All wages constitute mandatory subjects, including minimum wages negotiated directly by the union and wage supplements produced under a collective agreement creating a structure for direct bargaining with employees. "Wages are a mandatory subject of collective bargaining, whether minimum wages, or wages in any other form." *Evening News* supra at 381.

Second, the Board has applied the general "presumption of relevance" principle in cases involving the disclosure of individual contracts without requiring the union to specify the precise relevance of its information request. The Union need not show specific relevance unless the employer adduces an effective rebuttal of the relevance of the information. *WLOL Radio*, 181 NLRB 560, 561 (1970). Otherwise stated, the union pursuing wage information contained in individual contracts need not demonstrate its immediate relationship "to the agreement or to its precise relevancy to particular bargaining issues." *Evening News* supra 381.

Additionally, the ALJ recognized that the DMA had the obligation to request the information to investigate Ms. Ferguson's claim of inequitable treatment as part of its duty fairly to represent her, regardless of her Title VII claim. The duty originated under the Railway Labor

Act in *Steele v. Louisville & Nashville R. Co.,* 323 U.S. 192 (1944). In that case, the union and the employer negotiated provisions in the collective bargaining agreement, which permitted only white firemen to promote to engineer. The United States Supreme Court held the Union liable for complicity with the employer's racial discrimination. Accordingly, the union cannot stand by and permit the employer to engage in discrimination, even when the CBA contains no anti-discrimination clause. It must, at the very least, investigate such claims and take steps to rectify discrimination or it violates its duties.

Of course, the United States Supreme Court has applied the duty of fair representation to unions representing employees under the National Labor Relations Act. *Ford Motor Co. v. Huffman*, 345 U.S. 330, (1953); *Syres v. Oil Workers International Union*, 350 U.S. 892 (1955) The ALJ correctly recognized the DMA's duty to investigate and eliminate sex discrimination as part of its obligation to represent fairly Ms. Ferguson and the other members of the bargaining unit by quoting extensively from the NLRB's decision in *Westinghouse Electric*, 239 NLRB 106, 108 (1978) (ALJD at 7-8) In that quotation, the Board affirms the requirement of unions not to stand by in "passive ignorance," but to "propose specific contractual provisions to prohibit racial discrimination in terms and conditions of employment, and bargain in good faith to obtain such provisions in a written contract," if a discriminatory scheme exists. (7 ALJD 20 -8 ALJD 2, quoting from *Westinghouse Electric*, supra) Furthermore, in that quotation, the Board acknowledges that a union faced with allegations of discrimination "needs information related to race and sex in order to make proposals and then take other action to correct such discrimination." Id The quotation from *Westinghouse Electric* in the ALJ's decision also reminds unions that, "For breach of the duty of fair representation the union may be liable in a suit for damages, subject to injunction, or have its certification of representation revoked." (2

ALJD 27-29)

Accordingly, on November 14, 2016, when the DMA learned of Ms. Ferguson's claims of inequitable treatment and her intent to file an EEOC charge, it risked liability for violation of the duty of fair representation if it did not investigate those claims. The DMA considered what information to ask for, whether the individual contracts of all musicians or only the principal players most relevant to Ms. Ferguson's claims. (Tr. 54, 68) However, if the DMA could not and did not ignore her contentions of discrimination in "passive ignorance," without incurring potential liability for breach of the duty of fair representation.

The DMA cannot know the full extent of the action it would have taken had the CSA produced the requested information. It can only know that when it has the information. Perhaps the DMA would have proposed broader contract language prohibiting discrimination than currently appears in the contract.[3] Perhaps it could have filed a grievance. Perhaps it would have inveighed against any apparent discrimination with management. Clearly, it would have used the information to advise Ms. Ferguson regarding whether she had suffered apparent discrimination and to help her with future proposals for individual contracts. (Tr. 154)

The CSA argues that since the DMA has not made proposals concerning discrimination in negotiations, nor filed any grievances for Ms. Ferguson, assistance with her EEOC claim must have exclusively motivated its information request. This argument stands the proper order of the DMA's actions on its head. The DMA chose to investigate first and then act appropriately in accordance with the results of the investigation. The DMA's determination of the proper course of action must follow the investigation, not precede it.

The fact that the current CBA does not explicitly prohibit discrimination in individual

[3] Jt. Ex. 1 Article 15.1 p. 30 prohibits many forms of invidious discrimination in the filling of vacancies. However, the contract contains no other explicit anti-discrimination language.

contracts does not strengthen CSA's argument. The CSA must produce the individual contracts, "Regardless of the existence of an antidiscrimination clause in a collective bargaining agreement." *Westinghouse Electric*, supra, 108 The longstanding close relationship between discrimination and the duty of fair representation starting with the *Louisville and Nashville Railroad* case supra, dictates the production of information relevant to potential inequitable treatment of any bargaining unit member.

The CSA may recklessly disregard the DMA's obligations to represent its members fairly for collective bargaining purposes. However, the DMA must scrupulously observe those obligations for the protection of Ms. Ferguson, all other members of the bargaining unit and itself by persisting in its attempts to investigate her discrimination claims. No member would benefit from a violation of the duty of fair representation against any member.

The CSA's arguments that the DMA sought the requested information to assist Ms. Ferguson circumvent discovery limitations in her EEOC case or rests entirely on its fallacious premise that the Union sought that information to aid her in her in that case in the first place. The ALJ disposed fully of the CSA's arguments under cases such as *Southern California Gas Co*, 342 NLRB 613 (2004) (9 ALJD 13-29) In that case, the union sought the information for specific purposes other than the execution of its collective bargaining responsibilities. Here, the DMA fulfills those collective bargaining responsibilities through the request.

Finally, the CSA misplaces reliance on cases such as U*nbelievable Inc.* 318 NLRB 857 (1995), *Union Tribune Publishing Co.* 307 NLRB 25 (1992) and *WXLN TV* 289 NLRB 615. These cases hold that, since the Board's rules of procedure in **unfair labor practice proceedings** do not provide for prehearing discovery, the charging party may not circumvent those rules through an information request. According to the Board, enforcement of compliance

with such a request would impose a discovery requirement where none would otherwise exist. *Union Publishing* supra at 26. Since the record does not reflect that the DMA has any pending unfair labor practice proceedings against CSA other than the present case, and since discovery is available in EEOC litigation in Federal Court, these cases are totally inapposite.

c. The ALJ Correctly Found that the Individual Contracts Are Not Confidential. Also, the Orchestra Committee Never Agreed to Confidentiality.

In part B.3. of CSA's Brief, it contends that individual contracts are confidential and for the first time argues that the DMA, through the Orchestra Committee (OC) agreed to their confidentiality. No evidence or principle of law supports either finding.

First, as to the law, the NLRB has repeatedly rejected claims that personal services contracts negotiated by individual entertainers carry privacy interests that supersede the collective interests of the union in procuring them. See *Retlaw Broadcasting,* supra at 138 fn. 1 and cases cited there. In virtually every case in which the employer challenges the union's access to personal services contracts, the employer unsuccessfully raises confidentiality as a defense. For example, in *King Broadcasting,* supra 338, before dismissing the employer's claim, the Board quoted the criteria for determining whether privacy considerations will preclude an order for the employer to disclose information as follows:

> [I]n dealing with union requests for relevant, but assertedly confidential information, the Board is required to balance a union's need for the information against any 'legitimate and substantial' confidentiality interests established by the employer. The appropriate accommodation necessarily depends on the particular circumstances of each case. The party asserting confidentiality has the burden of proof. Legitimate and substantial confidentiality and privacy claims will be upheld, but blanket claims of confidentiality will not.

The employer has not come close to establishing a privacy exemption from disclosure in this case. It has made no argument for legitimate and substantial confidentiality interests. It has made only a blanket claim of confidentiality, which the Board should abjure.

The CSA then raises the novel and frivolous factual contention that it negotiated in good faith and reached a binding agreement with the Orchestra Committee that the individual contracts would remain private. No record evidence supports this outrageous argument. CSA cites only G.C. Ex. 1(o) to attempt to support it.

The Counsel for the General Counsel entered that document as part of the formal papers in this case. As the ALJ explained, in footnote 5 of his decision, such documents do not constitute substantive evidence, and the ALJ never admitted the document into evidence other than through the formal papers. (6 ALJD fn. 5) Therefore, the Board should not consider G.C. Ex. 1(o).

Even if the Board were to view G.C. Ex. 1(o) as substantive evidence, it demonstrates no agreement between the CSA and the Orchestra Committee to keep the individual contracts from the DMA. In G.C.Ex. 1(o) Attachment A, Phillip Hembree of the OC, writes to the Chief Executive of the CSA stating that the musicians "wish to keep their Personal Service Agreements confidential," according to a recent survey conducted by the Committee. (G.C.Ex. 1(o) Attachment A). Such a statement hardly constitutes an agreement, binding on the DMA, not to request those individual contracts from the CSA to satisfy its duties to represent fairly the bargaining unit regardless of the sentiments of the musicians. The CSA adduced no such agreement into evidence in this case.

Likewise, G.C. Ex. 1(o) Attachment B consists of two letters from the OC to the DMA. At the hearing, counsel for the charging party asserted privilege with respect to these internal union communications and declined to stipulate to their admissibility. (Tr. 19) The ALJ never admitted them. (Tr. 21 & 6 ALJD fn. 5) The Board should disregard them.

Even if they constituted evidence, the letters in Exhibit B of G.C. Ex. 1(o) do not

demonstrate a contractual commitment between the CSA and the DMA or its agent to restrict the DMA's access to the individual contracts of any musician. The OC merely stated that, "the majority of the musicians of the orchestra do not wish for the details of PSAs to become public." (G.C. Ex. 1(o) Exhibit B p. 1) The CSA fails to explain how that statement or the communications between the OC and the DMA generally show any agreement between the CSA and the Union. The Board should deny the CSA's claim that it agreed with the OC to maintain the confidentiality of individual contracts.[4]

d. The Information Request Concerns Mandatory Subjects of Wages and Potential Wage Discrimination

The ALJ correctly held that the DMA's information request concerned the mandatory subjects of wages and wage discrimination or inequities. (10 ALJD 35 – 11 ALJD 26) While the Board has ruled that overscale provisions like Article XVI in Jt. Ex. 1, involve permissive subjects of bargaining, because the union foregoes its exclusive right to bargain wages and other terms of employment, both the Board and affirming Circuit in *Retlaw Broadcasting Company*, 324 NLRB 138 (1997) affirmed *Retlaw Broadcasting Co. v. NLRB*, 172 F3d 660 (9th Cir. 1999) establish that the Union remains entitled to the information on the individually negotiated wages. Both explicitly acknowledge that the parties cannot insist to impasse on a permissive proposal for direct negotiations between management and employees on overscale. See *Retlaw* supra 324 NLRB 143, and 172 F3d at 667. Nevertheless, both require the employer to supply the requested

[4] The DMA does not address the CSA's argument that the OC had actual and apparent authority to agree with the CSA to keep the PSAs confidential, because no such agreement exists in any event. However, the Board should take note of §XIX B.1. of the expired CBA. That provision requires the involvement of the OC in the discussion of grievances **except,** *inter alia,* those arising under §16.3.C relating to individual contracts. That contract term strongly implies that the OC has no right to interfere with the DMA in the prosecution of grievances under §16.3.C, including any requests for information, which might lead to such grievances under that section. (Jt. Ex. 1 pp. 35 & 40)

information. See *Retlaw* supra 324 NLRB 142 and 172 F3d at 669-670.

The Board justified its conclusion, pointing out that the PSCs covered such subjects as compensation, which "under Section 8(d) of the Act, go to the core of the employer-employee relationship." [Citation omitted] *Retlaw,* supra 141. Accordingly, in *Retlaw* the Board impliedly distinguished between the negotiating *process* utilized to arrive at wages, a non-mandatory subject, and the actual wages themselves, a mandatory subject. While a proposal for direct dealing with employees is permissive, once the parties agree to such a proposal, a Union's request for disclosure of the individually bargained wages concerns a mandatory subject, wages. In this case, the DMA asked for documents showing the *wages* of employees, a mandatory subject. It did not ask for information about the *process* by which the CSA and the musicians arrived at those wages, a non-mandatory subject.

The holdings of the Board and the Ninth Circuit in *Retlaw* confirming that **wages** derived from individual bargaining concern a mandatory subject make ultimate good sense. The DMA's agreement to permit individual bargaining under Article XVI does not constitute a complete relinquishment of its exclusive right to bargain wages. DMA still exclusively bargains the base wages under Article IV of the agreement, and must know what portion of the employer's wage payments it has devoted to overscale if it seeks an increase in the percentage allocation of those resources to the base wage. The base wage is clearly a mandatory subject. It is unthinkable that the Union can negotiate a base wage without also having access to the overall wages earned by those in the bargaining unit, including overscale.

Additionally, the ALJ correctly concluded that by requesting the individual principal contracts in woodwinds and brass, to investigate "potential wage inequities," (Jt. Ex. 4 p. 1) the union sought information regarding possible wage discrimination against Ms. Ferguson. (11

ALJD 10-27) Relying on *Southwestern Bell Telephone Co.* 247 NLRB 171, 173 and *Electrical Workers 5 v. NLRB*, 648 F.2d 18 (D.C. Cir. 1980), modified on rehearing per curiam 1981 WL 27197 (D. C. Cir.1981) he concluded that the request sought information concerning the mandatory subject of the elimination of sex discrimination. Id The CSA failed to deal with these findings and conclusions of the ALJ because they defeat CSA's argument that the information request does not concern a mandatory subject.

e. The ALJ Correctly Decided that the DMA Did Not Waive Its Right to the Requested Information

The ALJ rightly determined that the DMA did not clearly and unmistakably waive its right to the overscale information. (11 ALJD 28- 12 ALJD 19) The Board should uphold that determination.

In *King Broadcasting*, the Board summarizes the principles applied to determine whether a union has waived its right to gain access to individual contracts. *King Broadcasting* supra at 337. First, the waiver must be "clear and unmistakable." The union can only waive its rights by an express provision in the collective bargaining agreement, or by conduct of the parties including bargaining history, or both. *King Broadcasting* supra at 337. Here, the CBA lacks any express language on union participation in the individual negotiations, no evidence of bargaining history appears in the record, and no other conduct of the parties demonstrates a clear and unmistakable waiver. The CSA has not met its "weighty burden" of demonstrating a clear and unmistakable waiver. *King Broadcasting* supra at 337.

The DMA's history of refraining from asking for the individual contracts does not preclude it from asserting its rights now. The lack of inquiries in the past does not show a "conscious relinquishment by the union, clearly intended and expressed," to give up its rights. *WCCO Radio* supra 844 F2d. at 516. In *WLOL Radio,* supra at 561, the Board declined to find a

waiver, even when the union had asked in the past for overscale information and had withdrawn the requests when the employer refused them. If that past behavior did not amount to a waiver, the absence of information requests does not also.

A careful examination of Article XVI as a whole demonstrates that the union did not waive its right to participate in individual negotiations. The union maintains an explicit role in the grievance and arbitration process if the "CSA's proposed changes [to overscale] are less favorable to any tenured musician than his or her then-current individual contract…." (Jt. Ex. 1 §16.3C) Section 16.3C expressly refers to Article XIX as governing this grievance and arbitration. Article XIX then explicitly grants the exclusive right to the CSA and the DMA to submit a matter to Arbitration. (Jt. Ex. 1 §19.1D) Individual musicians have no such right. Any such arbitration would concern a mandatory subject, wages, and CSA would have to comply with any request from DMA to obtain wage rates of bargaining unit members to compare them in the arbitration to the CSA's wage offer. The essential role the DMA plays at the arbitration stage in Article XVI strongly implies that it also may acquire information on the individual contracts at the earlier negotiation stage.

CSA's passing reference to *Raytheon Network Centric Systems*, 365 NLRB No. 161 (December 15, 2017) on page 25 of its Brief is not germane to the issues here. That case dealt with whether an employer committed a §8(a)(5) violation when it made unilateral changes consistent with past practice without bargaining during a contract hiatus. Here, consistent with the cases on waiver cited above, the DMA retained its right to obtain individual contracts always, even without previously exercising that right. Its request of January 4, 2017, (Jt. Ex. 2) did not alter any term and condition of employment.

f. By Exercising Its Right To Obtain Information Relevant to Its Representational Duties, the DMA Did Not Unilaterally Modify the CBA

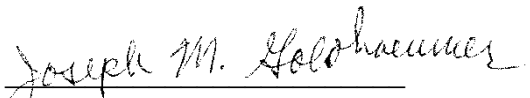
CSA's position that if the Board enforced the DMA's right to information it would "effectively modify the CBA" lacks merit. First, the parties have no current collective bargaining agreement to modify. Second, any such finding would contradict the Board's precedent according unions the right to garner PSAs from employers without disclosing the particular usage to which they might be put. Third, it would run counter to the Board's consistent message that unions have an obligation to investigate claims of discrimination by those they represent, and to oppose vigorously discrimination committed by the employer. The DMA welcomes the opportunity to monitor inequity in this workplace. All of its members deserve no less.

IV. Conclusion

For the above stated reasons, the Board should affirm in full the ALJD dated November 20, 2017.

Dated: January 23, 2018

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of January 2018, I electronically filed a true and correct copy of **CHARGING PARTY'S ANSWERING BRIEF TO THE EXCEPTIONS** with the NLRB's E-file, electronic filing system which will send notification of such filing to:

Gary Shinners
Executive Secretary
National Labor Relations Board
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Additionally, a true and correct copy of the foregoing and a Certificate of Service was served on all parties via e-mail as shown below.

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