

Senza Sordino

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Chairperson's Report

By Meredith Snow

Apathy

I get it. It feels as though nothing we do or say has any influence. What is the point in contacting our congressional representatives when the entire federal government is in gridlocked chaos? Do our voices count for anything? Congress appears to have no interest in passing legislation that might actually be of service to anyone other than the monstrously wealthy—and certainly not legislation that would be helpful to organized labor. The Butch Lewis Act is DOA. Why bother?



Diana Alencaster Photography

Unquestionably, the odds are long and the cards stacked against us.

But it is the process of participation which engenders the very existence of our democracy. If we are silent, we acquiesce to the moneyed and more powerful voices that for decades have worked to undercut unions and the working class.

If we don't speak up and vote, there is no possibility of regaining power within our federal government where, regardless of party affiliation, the influence of the oil and gas, pharmaceutical, and banking industries has dominated policy at the expense of ordinary citizens. We are greater in number but lesser in assets, so our effectiveness is entirely dependent on our participation.

Since the October 11th launch of ICSOM's email campaign in support of the Butch Lewis Act, our members have generated 1596 emails from 776 people, 37 phone calls, and eight tweets to our US

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President's Report

By Paul Austin

United We Stand

In 1858, during a campaign speech for the US Senate, Abraham Lincoln stated, "A house divided against itself cannot stand," referring to the need for our country to agree about the slavery issue—or face destruction. While he lost that specific election to Stephen A. Douglas, we know that Lincoln eventually was victorious, both in winning the presidential election two years later and (posthumously) having the thirteenth amendment become law in 1865, making slavery illegal in the United States.



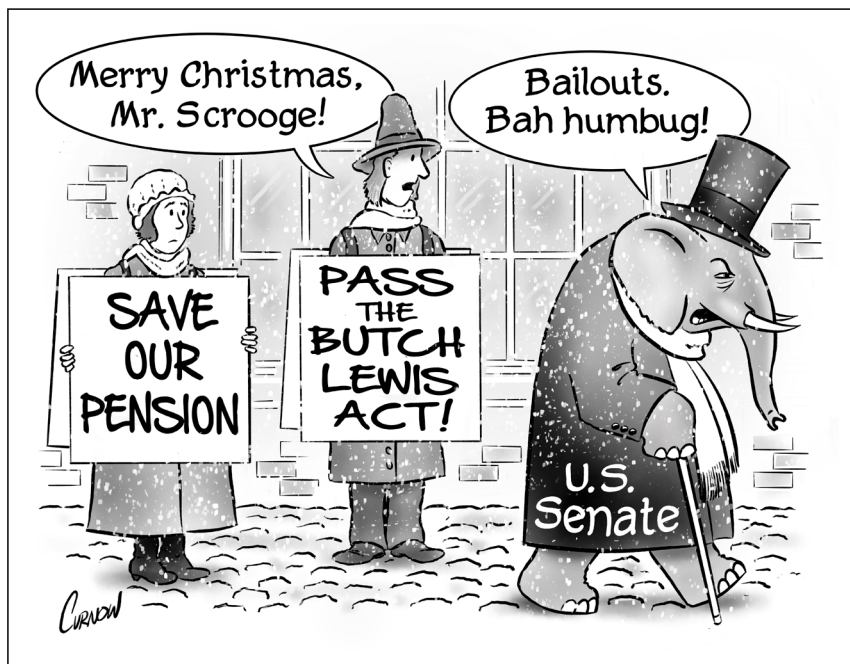
Tanya Johnson

In 2007, I heard similar inspiring words from a speaker the first time I attended an AFM player conference annual event.

That conference, of the Regional Orchestra Players' Association (ROPA), was held in San Francisco and included information about the labor history of the city. Until that time, I was unaware of the violent past experienced by those seeking to gain rights for the working class. That discovery provided me with a deeper appreciation for all who came before me and paved the way for the rules we currently have, ranging from being able to bargain a fair contract to having our voices represented and heard.

To date, I have attended nine ICSOM conferences and nine ROPA conferences, and last summer in Boston I spoke at the

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Jeffrey Cunniff

Apathy (continued)

Senators. That number, 776 people, is a far cry from our 3932 active and 1555 emeritus ICSOM members. The leading states and number of advocates who have responded to our campaign are: California (220), New York (103), Georgia (83), Illinois (67), and Texas (68). We have contacts in 42 states that have ICSOM and ROPA orchestras in residence. We have also contacted the Recording Musicians Association (RMA), the Theater Musicians Association (TMA), and our AFM Locals to add their voices to this campaign.

We need you. All of you.

It is the aggregate number of voters who speak up in support of Butch Lewis that will make the difference. Our Democratic Senators, who are more likely to support this bill, will have more leverage for their arguments. If we can get near full participation from our red-state orchestras, we can begin to mount a ground campaign working towards convincing some of the Republican Senators who are more likely to vote in favor, particularly in North Carolina, Georgia, Ohio, and Tennessee, by having ICSOM and ROPA members visit these Senators during their time at home. As we receive updates on what is happening on Capitol Hill with the legislation, we can take action to mobilize our musician advocates.

Most recently, the Butch Lewis Act has been tied to negotiations in Congress for the United States-Mexico-Canada Trade Agreement (USMCA), which replaces NAFTA. Linking pension relief to USMCA could be a positive step, but there is a long way to go and much opportunity to compromise the effectiveness of Butch Lewis as the bill moves its way through Congress. While the House of Representatives passed Butch Lewis in July with a nonpartisan vote, Republican Senators Chuck Grassley (Iowa) and Lamar Alexander (Tennessee) have just introduced their competing *Multiemployer Pension Recapitalization and Reform Plan*. (Note: see <https://www.plansponsor.com/union-pension-funding-crisis-solution-proposed-senate-republicans/>.) This proposal appears to put the lion's share of recovery on participants, in the form of a "copay" requirement and an incentive for plans to switch to a defined-contribution system akin to a 401(k) plan. All the more reason that our Senators need to hear from us in support of the Butch Lewis Act. The public funds needed to provide loans to shore up multi-employer pension plans under Butch Lewis don't add up to a hill of beans compared to the trillion and a half dollars in tax cuts under the Trump administration and the Wall Street bailout from 2008.

The sense of powerlessness and futility in our ability to be effective in our own governance, and the seeming inevitability of failure for the Butch Lewis Act, can be both overwhelming and paralyzing. The perception that our actions count for nothing in the political arena stifles participation. According to the Pew Research Center, 58.6 percent of Americans voted in the 2016 election—the third lowest turnout in the developed world. Foundational causes of voter apathy include lack of interest and knowledge of the issues; inaccessibility to registration and voting, including physical inability to access the polls; and disillusionment about the effectiveness of voting. We ICSOM musicians are not hampered by inaccessibility or »



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lack of knowledge. And I certainly hope that the preservation of our AFM pension fund is of interest to all of us.

We do not know the future. The action you take this minute affects what happens next—no outcome is set in stone. Please help us help you. Go to the website <https://p2a.co/DcR7C72> to contact your Senators now and show your support for the Butch Lewis Act. 

United We Stand *(continued)*

Theatre Musicians Association (TMA) annual conference. In 2020, I look forward to attending my first Organization of Canadian Symphony Musicians (OCSM) conference, which will be held in Regina, Saskatchewan, and I hope to attend a Recording Musicians Association (RMA) conference some day. It is important for the vitality of these organizations to have annual gatherings, share and learn together, and subsequently pass along information to our rank-and-file members.

This fall, ICSOM embarked on a new venture in hiring the Washington DC-based firm Phone2Action to provide us with the tools to launch our own online lobbying campaigns. Our first, to promote the Butch Lewis Act, began this October, and continues today. There will be other legislation that ICSOM will support, no doubt, and we will be calling upon our membership to give one minute of their time to participate.

Just one minute of your time. In the time you have read this article so far, you could have already accomplished this easy task!

With just a few strokes on your keypad, you can reach the politicians of your state simply by entering your zip code. By completing a few more entries, you can be an activist in a way that would have taken others much longer in the past.

A letter has already been written for you; however, if you wish to make adjustments, the option of creating a personalized message is provided. This link takes you directly to your Senators: <https://p2a.co/DcR7C72>.

So why did I support the Butch Lewis Act? It would appear that I don't have skin in the game, since my orchestra does not participate in the AFM-EPPF and my state's senators already support this legislation. In fact, one of them, Michigan Senator Debbie Stabenow, even co-authored the bill. Why should I bother supporting ICSOM's online campaign when it seems to have no direct effect upon me?


I supported it because it was the right thing to do. I gave one minute of my day to support the musicians of other ICSOM orchestras, orchestral musicians of ROPA, touring musicians of TMA, recording musicians of RMA, and millions of Americans who participate in multi-employer pension plans. In addition, I have shared the information on social media to encourage

ICSOM bylaws provide that dues are late after December 31. If your orchestra has not yet sent in your dues payment, please do so as soon as possible. Thanks for your support!

Michael Moore, ICSOM Treasurer

others to follow suit.

Know too that the government's legislative committee will look at the total number of supporters the bill has in all states. Each of our individual senators will be gauging the support for this bill before making their decision about how to vote. It is vital for them to realize that the Butch Lewis Act is important to us.

While Abraham Lincoln was not the first person to coin this phrase about unity, it still rings true today. Combined activities are noticed and heard. Collective actions have strength and power. 

The Radical New NLRB

By Kevin Case

We often hear the phrase “elections have consequences.” True enough, but sometimes those consequences fly under the radar. One example is the change in the makeup of the National Labor Relations Board (NLRB) that occurs when a new presidential administration takes over. That has never been

so apparent as it is right now.

The NLRB is the federal agency charged with enforcing the National Labor Relations Act (NLRA). Though not a prominent agency in the eyes of the general public, the NLRB has a significant impact on a major life activity of the vast majority of Americans: working. NLRB rulings profoundly affect the rights of employees

in both union and non-union workplaces.

Since the Trump administration took over in early 2017, the NLRB has issued a remarkable string of rulings that are unquestionably pro-employer, and that demonstrate a willingness to overturn decades of settled law in ways that are not at all in the best interests of workers—including musicians in ICSOM orchestras.

The reason for such a radical change in course is that the five Board members of the NLRB, who act as a quasi-judicial body in deciding cases that arise through NLRB administrative proceedings, are appointed by the President and confirmed by the Senate. They are appointed to staggered 5-year terms. In addition, the General Counsel of the NLRB, who decides which cases to bring before the Board, also is appointed by the President (to a 4-year term). A new administration, therefore, has the ability to effect wholesale change with respect to the very people responsible for both prosecuting and deciding cases that arise from disputes over the interpretation or enforcement of the federal labor laws.

Currently, the Board has only four members because no one has been nominated to replace the Obama-appointed member whose term expired in 2018. Of the four current members, three have now been appointed by Donald Trump and confirmed by the GOP-controlled Senate. Because three is the minimum number required to issue decisions, a 3–1 majority now solidly reflects the view of the Trump administration with regard to the respective rights of employers and employees. >>



Ava Kumari

Moreover, the term of the lone remaining holdover from the Obama administration expires this month (December 2019). The current administration thus has the ability to appoint all five members of the Board.

By tradition, the President typically allows the opposing party to choose two Board members, for a 3–2 ideological split, as a way of preventing revolutionary revisions to labor law when administrations change. This is not required by law, however, and the Trump administration and Senate have shown no willingness thus far to allow the Democrats to choose any Board members. Given the current political climate and this administration’s demonstrated lack of deference to institutional norms, I expect this bipartisan tradition to fall by the wayside.

Since the confirmation of the third administration nominee in April 2018, NLRB rulings have been coming fast and furious. Virtually all have been decided on a pro-employer basis, and many have explicitly overruled previous decisions—some from the Obama-era Board but many from well before—on no basis other than that the current Board members disagree with their predecessors. That is a significant departure from the approach of previously-constituted Boards and courts, which typically adhere to *stare decisis*—the legal principle of affording respect to precedent—in order to ensure stability and predictability in the law. It is rare for any adjudicator to overrule precedent simply because the adjudicator thinks the precedent is “wrong,” but that is precisely the approach of the current Board.

Below are three recent rulings most likely to have a significant impact on musicians in ICSOM orchestras.

I. Tobin Center for the Performing Arts, 368 NLRB 46 (Aug. 23, 2019)

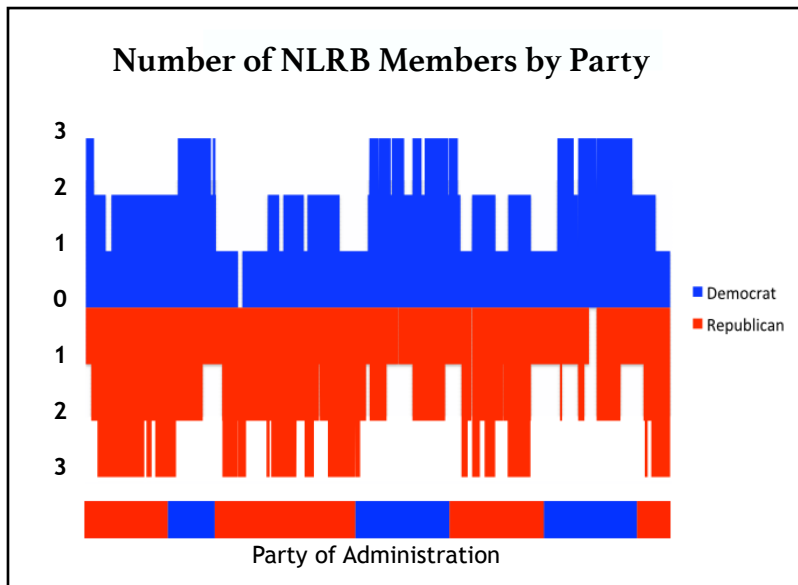
The NLRB’s decision in *Tobin Center* implicates ICSOM members quite directly because, well, it involved an ICSOM orchestra. The case arose when the musicians of the San Antonio Symphony (SAS) attempted to leaflet on the sidewalk in front of their primary performance space, the Tobin Center, to protest Ballet San Antonio’s use of a recorded orchestra instead of live musicians. Tobin Center staff directed San Antonio police officers to eject the musicians from the sidewalk, which is owned by the Tobin Center (though it is open to the public). The musicians were forced to relocate across the street, where there was less patron traffic.

SAS doesn’t own the Tobin Center and doesn’t have an exclusive lease. Instead, like many ICSOM orchestras, SAS has a licensing agreement with the Tobin Center that permits SAS to use the hall for a certain number of weeks per season; other arts groups and traveling acts use the hall in other weeks. Roughly 80% of the SAS musicians’ work occurs at the Tobin Center,

but as in most every orchestra the musicians perform some services elsewhere. The musicians’ status vis-à-vis the Tobin Center at the time of their protest, therefore, was that of off-duty employees of a contractor, at a time when that contractor (SAS) did not have the right to use the property.

Such a fact pattern requires balancing two important legal rights: the inherent right of a property owner to exclude persons

from its property, versus the statutory right of employees to exercise their rights under Section 7 of the NLRA “to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.” At the time of the SAS musicians’ leafletting attempt, the legal standard regarding the resolution of those competing interests was clear: under the NLRB’s decision in *New York New York Hotel & Casino*, 356 NLRB 907 (2011), a property owner may exclude off-



Source: National Labor Relations Board

duty employees of a contractor who are regularly employed on the property only where the owner is able to demonstrate that their activity significantly interferes with the owner’s use of the property, or where exclusion is justified by another legitimate business reason.

Under that test, the Tobin Center plainly had no right to call the police on the SAS musicians. The musicians were regularly employed by SAS at the Tobin Center, and nothing about their leafletting interfered with the ballet performances. When the union filed an unfair labor practice on their behalf, therefore, an administrative law judge at the NLRB had no difficulty finding that the Tobin Center violated the NLRA when it kicked the musicians off the sidewalk.

But when the Tobin Center appealed the decision to the full Board, the new Board used that opportunity to rewrite the law. It overruled *New York* and created a new rule: off-duty employees of a contractor seeking to engage in Section 7 activity are “trespassers,” whom the property owner has the right to exclude from its property, unless (i) those employees “work both regularly and exclusively on the property,” and (ii) the employees have no “alternative means to communicate their message.” “Regularly” means the contractor “regularly conducts business or performs services” on the property; and “exclusive” means the employees “perform all of their work for that contractor on the property.” (Emphasis mine).

Under that new test, the Board held, the Tobin Center had the absolute right to eject the SAS musicians from the sidewalk: the musicians didn’t work “exclusively” at the Tobin Center because in the past season “only 79 percent” of their services occurred there; and they didn’t perform “regularly” at the Tobin Center because SAS was there “only 22 weeks” per season. The Board also noted that even if the musicians could have passed >

the “regularly and exclusively” text, they still were properly ejected because they had an “alternative means to communicate their message”—they could (and did) go across the street.

It’s a bad decision for many reasons. First, as the lone non-Trump-appointee Board member noted in her dissent, the Board was overruling clear precedent for no other reason than that the three-member majority disagreed with it. Indeed, the 2011 decision in *New York* had been approved by the courts: it had been enforced by the D.C. Circuit Court of Appeals (which hears appeals from Board decisions), and the Supreme Court had declined a petition to challenge it. No other court case or Board ruling had ever questioned it.

Second, the new legal standard is so strict as to essentially allow property owners to exclude off-duty employees seeking to engage in Section 7 activity pretty much at will. Evidently, off-duty contractor employees won’t pass the “exclusively” test unless 100% of their work is done on the property owner’s premises, and nowhere else; and it seems that “regularly” requires that the contractor have a near-constant presence on the property. The Tobin Center was entitled to treat the SAS musicians as total strangers—trespassers!—despite the fact that they performed the vast majority of their work there. Such a rule defies all common sense and affords no weight whatsoever to the rights afforded employees under Section 7 of the NLRA.

Even more absurd, the Board declared that “social media, blogs, and websites” can serve as sufficient “alternative means” of communicating a message—thus guaranteeing that there will never be an instance where employees have no alternative means. As a practical matter, therefore, the new rule announced in *Tobin Center* will prohibit off-duty employees of contractors from engaging in Section 7 activity in their workplace in every instance—even if they work there regularly and exclusively—simply because they can post a message on Facebook.

As a result of this decision, ICSOM orchestra musicians will need to take extra care when engaging in leafletting, performing, or other Section 7 activity. You will need to ascertain whether the sidewalk or plaza at issue is public property; and if not, you will need to find who owns it and their relationship with the orchestra. Any group contemplating such activity will need to consult with local counsel.

II. *MV Transport*, 368 NLRB No. 66 (Sept. 10, 2019)

In a union workplace, the NLRA requires an employer to bargain in good faith with the union over mandatory subjects of bargaining (e.g., wages, hours, and other terms and conditions of employment). Accordingly, an employer may not implement a work rule or practice that effects a material (i.e., not insignificant) change without bargaining with the union, unless the employer has been relieved of that obligation. Most often, the employer is relieved of its bargaining duty only when the union has waived its right to bargain—either through contract language or a course of conduct showing such a waiver.

For many years, as reflected in *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), the Board has held that any such waiver must be “clear and unmistakable.” That requires evidence that the union and the employer “unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment

term.” Without that showing, the employer is not permitted to make a unilateral change.

In *MV Transport*, the employer unilaterally implemented revisions to certain policies and work rules. Relying on the “clear and unmistakable waiver” standard set forth in *Provena*, the union filed an unfair labor charge. But the Board, overruling *Provena*, rejected the waiver standard altogether and found all of the employer’s unilateral changes permissible. The Board decided on a new, “contract coverage” rule: an employer is entitled to make a unilateral change if the proposed change falls “within the compass or scope of contract language that grants the employer the right to act unilaterally,” based on “ordinary principles of contract interpretation.”

Translated into English, this means that instead of looking to see whether the union waived its right to bargain, the Board will now look at the CBA to see if the change is “covered by” an existing contract provision. That opens the door for employers to rely much more heavily on so-called management-rights clauses to justify unilateral changes.

Before *MV Transport*, management-rights clauses, which often have language permitting the employer to “promulgate reasonable rules and regulations in the workplace” (or something similar), did not support a finding of a waiver unless the rights afforded management were specific to the subject matter of the proposed change. (For example, a clause allowing management to promulgate rules regarding “on-stage decorum” would probably allow management to unilaterally implement a no-cell-phones-on-stage policy; but that would not work if the clause simply said, “reasonable rules and regulations.”) But now, under *MV Transport*, if a clause is interpreted so that the proposed change is “within the compass or scope” of the clause, unilateral implementation by the employer will be permitted.

As if there were any doubt that the Board intended to give employers much more authority to act under management-rights clauses, it offered a helpful example: “if an agreement contains a provision that broadly grants the employer the right to implement new rules and policies and to revise existing ones, the employer would not violate [the NLRA] by unilaterally implementing new attendance or safety rules or by revising existing disciplinary or off-duty-access policies.”

This is significant. You may be accustomed to your management coming to the union or orchestra committee if they want to change attendance rules, disciplinary policies, safety rules, or backstage-access policies. They had to, because in most orchestra CBAs, management-rights clauses (if they exist at all) are typically broadly worded and would not have constituted a “clear and unmistakable” waiver of the right to bargain over such specific rules. But now, management may not need to come to you. Depending on how the management-rights clause is written, or whether there are other provisions in your CBA granting management the right to act unilaterally in certain circumstances, your management may be able to simply tell you, “these are the new rules—deal with it.”

III. *LA Specialty Produce Co.*, 368 NLRB No. 93 (Oct. 8, 2019)

LA Specialty Produce grew out of the Board’s 2017 decision in *Boeing Co.*, 365 NLRB No. 154 (Dec. 15, 2017), in which the Board further upended the existing framework regarding the >

legality of work rules.

As noted before, under Section 7 of the NLRA, all employees—both union and non-union—have the right not only to organize, but “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Under the standard in place for many years before *Boeing* (as articulated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)), that meant a work rule or policy issued by an employer is unlawful if it “reasonably tends to chill employees in the exercise of their Section 7 rights.” A work rule “tends to chill” if employees “would reasonably construe the rule’s language to prohibit Section 7 activity.” The *Lutheran Heritage* standard applies to work rules in union and non-union workplaces alike, whether bargained for or not.

Admittedly, the *Lutheran Heritage* standard led to some questionable results. As interpreted by the Obama-era NLRB in particular, it pretty much prohibited employers from issuing any kind of workplace behavior rules, social media policies, or confidentiality policies with any teeth. As I discussed in my bullying and harassment presentation at the ICSOM conference in 2016, the NLRB found unlawful a whole host of rules that don’t seem all that unreasonable, such as “treat colleagues with respect” or “work harmoniously.” But because the Board had determined that those rules would “tend to chill” employees in exercising their Section 7 rights to discuss terms and condition of employment, employers were not permitted to maintain them. Board decisions under *Lutheran Heritage*

also led to some oddly inconsistent outcomes; for example, it was unlawful to maintain a rule prohibiting “false statements,” but a rule prohibiting “gossip” was fine. (I’ve never been able to figure that one out.)

But in overruling *Lutheran Heritage* in *Boeing* and then elaborating the new standard in *LA Specialty Produce*, the Board has made things worse. Under the new rule, the NLRB will place employer work rules in one of three categories: rules in Category 1 are lawful; Category 2 rules require individualized scrutiny on a case-by-case basis; and Category 3 rules are unlawful. The Board’s goal is that subsequent rulings will operate to develop a kind of database of employer rules, with the categories providing guidance as to what kinds of rules are permitted.

In determining the categories, the Board will engage in a two-step process. The charging party first has to prove that “a facially neutral rule, reasonably interpreted by an objectively reasonable employee, may interfere with the exercise of [Section 7] rights.” If that showing can’t be made, that is the end of the analysis; the rule is deemed to be a lawful, Category 1 rule. If the showing is made, then the second step of the analysis requires the NLRB to balance the nature and extent of the rule’s impact on Section 7 rights against the employer’s “legitimate justifications” for the rule. If the employer’s justifications outweigh the impact on Section 7 rights, the rule is lawful and also goes into Category 1. If the employer’s justifications do not outweigh the impact on Section 7 rights, the rule is unlawful >

Newsletters of Note

Several ICSOM orchestras publish newsletters, including the musicians of the Indianapolis Symphony Orchestra. This article from their November issue, reprinted by permission, exemplifies the fine writing one can find there. To subscribe, visit <https://mailchi.mp/c38aa8355976/isomusicians-subscribe>

Have you ever heard classical music spilling down Mass Ave on a Tuesday night? This month we are highlighting a special partnership with The Chatterbox jazz club and Classical Music Indy:

As 8 p.m. approaches on the first Tuesday of every month, casually clad figures with instruments in tow begin to file into the cozy confines of the iconic Mass Ave jazz club, The Chatterbox, for Classical Revolution Tuesday!

Classical Revolution is a national movement, founded in San Francisco in 2006 by Charith Premawardhana, with the goal of inviting musicians of all skill levels to present classical music in casual, nontraditional spaces.

Classical Revolution Indianapolis, a chapter of the international Classical Revolution, hosts musicians from a variety of sources: the Indianapolis Symphony, the Indianapolis Chamber Orchestra, and the freelance community. These musicians gather in small chamber ensembles to read standard repertoire or try out new works. Strings, winds, brass, and percussion all have taken the club’s small stage.

Enjoying a beverage while talking with colleagues, Chatterbox regulars, and those who just happen across the Chatterbox while visiting our city helps us strengthen bonds with the community, reaching those who might not find classical

music otherwise.

Retired ISO cellist Anne McCafferty has served as the organizer of Classical Revolution Indianapolis nearly since its formation in 2011.

“For musicians accustomed to reaching for perfection in a concert hall, Classical Revolution offers a nonjudgmental environment for experimentation, including mistakes, that really connects us to our audience,” says McCafferty. “The idea is to communicate, not impress. For the listener, the expectation of a classical musician is put aside as they see us in our jeans, playing music we love and have a passion for. It’s up close and personal.”

For Chatterbox owner David Andrichik, the addition of a monthly classical chamber music jam that brings in a diverse crowd has further expanded his vision of inclusivity at his club.

“I was certainly intrigued and hoped it would create a new audience and generate weeknight business for my jazz club. Over the years my expectations have been far exceeded! Wonderful music, wonderful musicians, and wonderful new friends!” says Andrichik.

A tip jar gets passed around all night, and the Chatterbox adds a small stipend to help raise money for the Metropolitan Youth Orchestra, the New World Youth Orchestras, the Distressed Musicians Fund of the American Federation of Musicians Local 3, and Classical Music Indy, which provides promotional support for Classical Revolution Indianapolis.

The next edition of Classical Revolution Indianapolis is at 8 p.m. on November 5 at the Chatterbox Jazz Club, located at 435 Massachusetts Ave. We hope to see you there!

and goes into Category 3. If it could go either way, then it is a Category 2 rule and will require “individualized scrutiny” of how the rule might be applied on a case-by-case basis.

Here is how this will play out: virtually every employer work rule will now fall into Category 1 (lawful) at either the first or second step of the process. At the first step, the current, pro-employer Board will simply find no proof that the rule would interfere with Section 7 rights when “reasonably interpreted by an objectively reasonable employee.” End of story. But even if the analysis proceeds to the second step, any balancing of the rights of employees and the “legitimate justifications” of employers will obviously have a thumb on the scale under the current Board (as evidenced by the way the Board in *Tobin Center*, discussed above, balanced the interests of the Tobin Center against those of the SAS musicians).


LA Specialty Produce demonstrated this in remarkable fashion. There, the employer’s confidentiality and media contact rules were challenged. Regarding the confidentiality rule, the Board found that it was unnecessary to even reach the balancing test because the hypothetical “objectively reasonable employee” would not interpret the rule so as to interfere with Section 7 rights at all. That’s questionable enough; but it is the Board’s analysis of the media contact rule that is particularly revealing and will impact ICSOM musicians.

The employer’s media rule stated that “employees approached for interview and/or comments by the news media cannot provide them with any information” and designated a management person as “the only person authorized” to comment “on Company policies or any event that may affect our organization.” Under the old *Lutheran Heritage* standard—and even under the new *Boeing* standard—this rule should have been thrown out immediately, as it (on its face) would prohibit employees from discussing anything with the media, including all subjects relating to their employment. It is difficult to imagine a more blatant Section 7 violation. But the Board again approved of the rule at the first step of its analysis, holding that the mythical “reasonable employee” would interpret the rule to prohibit employees only from speaking “on the [employer’s] behalf.” If it seems that the Board simply pulled the “on the employer’s behalf” language out of thin air, that’s because it did—that language appears nowhere in the employer’s rule.

What this shows is that when the adjudication of whether a work rule is lawful turns on the imagined interpretation of a “reasonable employee,” the adjudicator will reach the desired result simply by conjuring up their own preferred image of that hypothetical employee. The legal test can therefore be manipulated to reach a predetermined result, every time. The current pro-employer Board that wants to uphold employer’s work rules will imagine a sophisticated, conservative employee who understands his or her place in the organization and appreciates the business interests of the employer; a more pro-employee Board will imagine a worker who is hesitant to speak their mind about the workplace out of fear of violating a rule and getting fired.

Managements in some of our ICSOM orchestras have tried to implement (or bargain for) media-access rules, non-disparagement policies, social-media policies, and the like. For the most part, it has not been difficult to turn back these efforts, either on grounds that the rules must be bargained for or that they vio-

late Section 7 rights. But under *LA Specialty Produce*, it seems that such rules will be interpreted in whatever way will serve to uphold them (even if it means making up new language and pretending it was in the rule all along). At a time when ICSOM musicians are trying to build their own identity and reach out to their audiences and patrons, there are some managements who may be all too eager to stifle those efforts—and now they have a sympathetic federal agency that will help them do it.

We will have to see how this all plays out. But when you hear the phrase “elections have consequences,” think of these rulings. The consequences are more direct, and more personal, than most people imagine. 

Note: the author is ICSOM General Counsel.

The Butch Lewis Act and the USMCA

By Alfonso Pollard

Here is what is happening in Congress and at the AFL-CIO regarding the connection between the United States-Mexico-Canada Agreement (USMCA) and pension legislation.

The idea of attaching the Butch Lewis Act to the USMCA was first floated by Rep. Richard Neal (D-MA), Chair of the House Ways and Means Committee, using the trade agreement as a possible “must pass” vehicle. However, there are complications with this proposal.

It should be made clear that House Speaker Nancy Pelosi, Mr. Neal, and Mr. Scott, chair of the House Education and Labor Committee, are listening closely to labor on the multiemployer pension issue. They are not moving forward with Senate proposals unless labor is satisfied, regardless of what comes to fruition after the Senate proposal is reconciled with the House bill.

A Senate White Paper, *Multiemployer Pension Recapitalization And Reform Plan*, authored by Senators Charles Grassley (R-IA) and Lamar Alexander (R-TN), was released on Wednesday, November 20, along with a 77-page Technical Explanation. Legal and actuarial experts at the AFM-EPF and the AFL-CIO have begun evaluating details of the plan.

Attaching the pension bill to the trade bill is problematic for several reasons. Brett Gibson, the AFL-CIO legislative representative, notes the following:

2015 Fast Track Authority requires provisions contained in the trade implementation bill . . . to include ‘only such provisions as are strictly necessary or appropriate.’

So it would be a stretch to say that Butch Lewis or any pension bill could be included in the actual implementing legislation, as they are not strictly necessary or appropriate to the trade agreement.

Another path would be to have Congress pass a pension bill, and to have the president sign it, with an agreement that once this was done, NAFTA 2.0 would be brought up for a vote. (*Note: NAFTA 2.0 refers to the USMCA, which is a renegotiation of the NAFTA treaty.*) This seems unlikely, as the President would have to take it on faith that the House Democrats would pass NAFTA 2.0 after he signs the pension bill.

Finally, a third option (seems the most realistic) would be >>


for the House to vote to strip Fast Track Authority from the NAFTA implementing legislation, attach the pension bill to the implementing bill, then vote on the combined bills under regular order and send it to the Senate.

Brett notes, “I still think it was an odd connection to make and is unlikely to happen . . . but you never know in [Washington].”

In order to earn labor movement support, it is vitally important that both of the two bills have appropriate labor protections and other key factors. Speaker Pelosi is depending on our input and seal of approval on the pension legislation. Union leadership seems unwilling to sign off on one bill solely for the sake of getting another implemented; each piece of legislation must pass muster on its own merits.

It should be noted that despite that creation of a Joint Select Committee last year to work cooperatively on a solution, the pension issue has now become a highly partisan one where Republicans continue to blame union trustees for mismanaging the funds, often saying that fund trustees and administrations have broken promises to participants and retirees, and that the public should not be responsible for “bailing out” these funds because of what Republicans claim to be union malfeasance.

Republicans continue to say that the Butch Lewis Act is not the answer, because it only throws good money after bad and does not create a solution that solves the investment problem. They also believe that tying it to USMCA would make Butch Lewis a poison pill that would defeat USMCA and allegedly harm US trade. For its part, organized labor does not see USMCA in its current form as a successful trade bill without strong labor, copyright, and patent protections. Republicans have opined, using this Congressional Budget Office report as backup (*Note: see https://www.cbo.gov/system/files/2019-07/hr397_2.pdf*), that pension funds receiving loans, except for the AFM fund, would not break even nor would they ultimately be able to pay back these 30-year Treasury loans.

At this point, the ultimate success of getting Butch Lewis passed by the stratagem of tying it to trade legislation is uncertain. We at the AFM will continue to strive to obtain legislative relief, to ensure the longevity of the AFM-EPF without resorting to cuts in benefits. 

Note: the author is AFM Legislative-Political Director.

Advancing Women

By Willa Henigman

From November 6–9, 2019, the Dallas Symphony Orchestra hosted its first annual Women in Classical Music Symposium. This conference brought together performers, entrepreneurs and administrators working in the arts and education for panel discussions and networking sessions, and included add-on options for film screenings, art tours and concerts.



Sylvia Elzaton

To kick off the Symposium on Tuesday November 5, the DSO presented a concert with an all-woman orchestra, made up of Dallas Symphony Orchestra women and extra players, to promote arts education for girls and equal op-

portunity in the fields of science, technology, engineering, the arts, and mathematics. Sponsored by Full STEAM Ahead, a group of women business executives and leaders in Dallas, the concert featured female soloists, composers, and conductors.


In welcoming guests to the symposium, DSO President and CEO Kim Noltemy stressed the Dallas Symphony’s commitment to advocating for women in classical music, in order that “women can truly realize their place in the orchestral world.” This commitment is shown in several of the DSO’s recent appointments, such as Principal Guest Conductor Gemma New, Assistant Conductor Katharina Wincor, and Composer-in-Residence Julia Wolfe. However, the nationwide statistics on women’s participation at the highest level of classical music leadership are rather disappointing. Jesse Rosen, President and CEO of the League of American Orchestras lamented that, for example, only 15% of U.S. conductors are women, as are only 10% of Music Directors. The Women in Classical Music Symposium was designed to start dialogue and provide artists and administrators with tools to rectify this type of inequality.

Topics at the panel discussions ranged from the inspirational to the practical, from “Lifting up the Next Generation of Women” to “Employability and Career Pathway Development for Musicians and Administrators.” While several of the talks featured Dallas Symphony Orchestra musicians and other local talent, panelists were also invited from across the country, including Atlanta Symphony Orchestra Executive Director Jennifer Barlament and Boston Symphony Orchestra President and CEO Mark Volpe.

The importance of mentoring emerged as an overall theme of the week’s events. At the opening Keynote Presentation, so-



Kim Noltemy and Lucy Dhegrae

prano Dawn Upshaw was honored with the 2019 Award of Excellence, and she in turn chose the recipient of the Symposium’s Career Advancement Award, mezzo-soprano Lucy Dhegrae. Upshaw praised Dhegrae for her innovative programming and championing of new music. Dhegrae thanked Upshaw for her teaching and mentoring, and shared Upshaw’s advice to “stay in your skin” and have inner integrity. Perhaps this Symposium will encourage more women to express themselves through a classical music career, and encourage presenters to more fully appreciate their voices. 

Note: the author is Associate Principal Oboe in the DSO.

Making Time for Remembrance

By Tatjana Mead Chamis

The Clarion Quartet, consisting entirely of members of the Pittsburgh Symphony Orchestra (PSO), had the honor of playing at the American Academy in Berlin on the orchestra's recent European tour. Joining us was our music director, Manfred Honeck, and members of our board and management. The special concert, with the theme



The Clarion Quartet (l to r): Marta Krechkovsky, Jennifer Orchard, Bronwyn Banerdt, and the author

“Peace, Culture, and Remembrance”, was scheduled on the orchestra's first day off, between PSO concerts in Hamburg and Hannover, and coincidentally fell on the day of the anniversary of the shootings at the Tree of Life synagogue in Pittsburgh. (Note: see “Pittsburgh Symphony Responds” in the December 2018 issue, and “Where Words Fail” in the March 2019 issue.)

In our mission as a quartet, we play the music of great composers whose lives were marked by political suppression and control, as a means for us to shine light on their subsequently neglected work. It has given us true purpose in our music making, a chance to do something about the enormity of this cultural and human injustice.

Interestingly, the last time our quartet deviated from a tour schedule to play a special concert was for a trip to the well-known former concentration camp of Theresienstadt, now a memorial. There we had played Viktor Ullmann's Third Quartet, which he wrote at the camp, on the original Magdeburg barrack stage where the famous children's opera *Brundibár* was performed. This was three years prior, in the early months after the founding of our quartet. We played the same quartet in Berlin to open the program, as we remembered souls lost just a year before in one of the world's most violent attack against Jews since the Holocaust.

After the Ullmann, we played two pieces by exiled Polish composer, Mieczyslaw Weinberg, and finished with Dimitri Shostakovich's Seventh Quartet.

Next came a discussion panel, mediated knowledgeably by Academy alumnus Harry Liebersohn, with Manfred Honeck and Pittsburgh writer, Adam Ehrlich Sachs. After words of remembrance, the conversation focused on the role of music in peace making, healing, and as a political tool. This discussion I found very interesting and wished to have been able to

continue, as the minds gathered in that room were part of the intellectual and cultural community fostered by the Academy. We could have spoken on these topics and delved into their importance for hours longer.

The main sentiment that has stayed with me is that music has always been the most powerful communicator, as it speaks without need for translation, directly to the heart, and has been the greatest healer of human hearts in times of tragedy, has the ability to lift sunken spirits, and to create a space to feel. It is our responsibility as musicians to further the work of those who had the courage and fortitude to create music and beauty under the worst of circumstances.

I'm honored to be a member of this quartet, to have been able to represent the Pittsburgh Symphony at this event, and to have the support of our orchestra and management as we go forward, hoping to inspire more musicians to take on this important work.

Note: the author is Acting Principal Viola of the Pittsburgh Symphony Orchestra.

Newslets

A Shared Sing-along

In October, the Kansas City Symphony premiered a new work for children's chorus and orchestra at a series of Young People's Concerts and the sensory friendly concert Postcards from the Americas. The orchestra's principal music librarian, Elena Lence Talley, personally commissioned “Come and Sing a Song with Me” from composer Gary Fry.

Talley commissioned the work, with lyrics in English and Spanish (and a version entirely in Spanish, translated by KCS principal horn, Alberto Suarez), “in honor of my father and his family, who came here from Cuba, and in honor of immigrants of every hue and background,” she said. The work is scored in such a way that it can be performed by large or small orchestra, with an audience sing-along or a vocal solo.

In describing the piece, Fry said, “For me, music is the very best way to connect with people. When singing or playing music together, it's easier to realize how alike we are, even if we are from very different backgrounds or different parts of the world. If they (kids) take this song to heart, I really believe that the world can be an even better, more beautiful place to share.”

Talley intended the three-minute work to have a place on educational concerts, not just for the KCS, but for all orchestras. To that end, she and Fry are making the music (full score, orchestra parts, piano/vocal score, and educational materials) available in PDF format free of charge to any organization that requests it. (Note: those interested in the music may contact Talley at etalley@kcsymphony.org or 816-218-2644.) Already, in the Kansas City area, several schools have reported that they are programming the song on their own concerts.

“I must say how proud I am of both Elena and the KCS for not only the new piece but also its free access to interested orchestras,” said ICSOM President Emeritus Brian Rood. “It is noteworthy and should be shared with musicians across ICSOM.”

New Motown Harmony

The Detroit Symphony Orchestra (DSO) announced in November that it would embark on a project to provide a musical instrument to every school student in Detroit who wants to learn to play. The initiative is also intended “to bolster economic and workforce development in Detroit,” according to a DSO press release.

Titled Detroit Harmony, the project already has funding for the first phase—an 18-month planning phase—with major support from the Ralph C. Wilson, Jr. Foundation and the Max M. and Marjorie S. Fisher Foundation.

Caroline Cummings Rafferty, chair of the Max M. & Marjorie S. Fisher Foundation’s Arts & Culture committee added, “My grandmother and grandfather were deeply committed to supporting the work of the leaders, musicians, and educators of the Detroit Symphony. My father Peter, my uncle Phillip, and so many in the family have built on that passion. Detroit Harmony is the latest important contribution and investment the DSO has made in the creative education of our city’s youth, and we are grateful to be a part of it.”

The DSO also said that Detroit Harmony was a direct result of the orchestra’s Social Progress Initiative and the commitment the orchestra made in 2017 to improve the quality of life for all residents of the city.

“The DSO has the responsibility and the opportunity to drive social progress forward for a stronger Detroit, and every child in our city will again have the opportunity to explore all that music has to offer in learning to play an instrument,” said Mark Davidoff, Chairman of the DSO’s Board of Directors. “As a leader in music education and a stakeholder in the economic success and creative vibrancy of Detroit, the DSO believes it can and must play a leadership role in building extraordinary partnerships between schools, arts and culture program providers, and funders that can fulfill this mandate.”

Nosedá’s New Label

In November, the National Symphony Orchestra (NSO) announced the launch of its new, eponymous record label, in partnership with LSO Live. It joins several other ICSOM orchestras that have taken similar steps since the turn of the century, including the San Francisco Symphony and the Chicago Symphony Orchestra.

The first release on the new label, which is planned for February 21, 2020, will be a recording of Copland’s Suite from *Billy the Kid* and Dvořák’s Symphony No. 9. These performances were recorded live in the Concert Hall of the John F. Kennedy Center for the Performing Arts in June 2019, conducted by NSO Music Director Gianandrea Nosedá. “The National Symphony Orchestra and I . . . believe recordings are an essential part of an orchestra’s life because they capture singular musical experiences for future generations to enjoy,” said Nosedá.

LSO Live, the label of the London Symphony Orchestra that was created in 1999, will support the development and distribution of the NSO label. The NSO is the first US orchestra to partner with LSO Live, whose other distributed labels include those of the Mariinsky Theater and King’s College, Cambridge.

“We are excited that the release of our first recording with

Maestro Nosedá will inaugurate this new label,” said Robert Rearden, co-chair of the NSO orchestra committee. “We think it will be an excellent way to launch our first international tour under his leadership.”

Future planned recordings for the new label include the complete cycle of Beethoven symphonies in May and June of 2020, in celebration of the Beethoven sestercentennial.

Boston-Leipzig Alliance


The Boston Symphony Orchestra (BSO) recently welcomed the Leipzig Gewandhaus Orchestra (GHO) to Boston for its celebration of “Leipzig Week”. The mini-festival featured performances by the GHO alone and, more unusually, several performances of a program by a combined orchestra, all conducted by their shared music director, Andris Nelsons.

The festival is part of a planned five-year alliance between the two orchestras that launched in February 2018. The alliance has already fostered residencies and tour stops of each orchestra in the other’s home city, musician exchanges between the groups, and co-commissions of new works as well as shared and complementary programming.

The GHO performances, on October 27 and 29, were intended in part to commemorate the 30th anniversary of the Peaceful Revolution and the fall of the Berlin Wall that was its culmination.

The orchestra on stage for the combined orchestra performances comprised about 40 members of the GHO together with a group of BSO musicians that rotated between pieces, so that virtually every member of the BSO was involved in the performance. Each section of the orchestra was a combination of GHO and BSO players. One of the works on the program, the *Sinfonia Concertante in B-flat for oboe, bassoon, violin, and cello*, by Haydn, featured two soloists from the BSO (John Ferrillo, oboe, and Richard Svoboda, bassoon) and two from the GHO (Frank-Michael Erben, violin, and Christian Giger, cello).

The festival also included ancillary events, such as a performance at the Boston Public Library featuring one wind quintet from each orchestra playing alternate movements of Reicha’s *Quintet for Winds in E-flat Op. 88, No. 2*, with a panel discussion of the “sonic differences” between the two groups.

“The GHO-BSO exchange has been an extremely positive experience for musicians on both sides of the program,” said James Markey, BSO orchestra committee chair. “In addition to experiencing different schedules and overall environments, musicians on both sides are able to share experiences, stories, and knowledge with their colleagues in both the other orchestra and their own. It has fostered growth and appreciation for what each orchestra has, as well as initiated conversations regarding ways in which each ensemble can continue to grow.” 

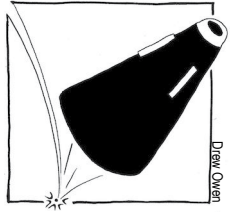
The online version of *Senza Sordino* is available at
www.icsom.org/senzasordino/

Active and Emeritus members wishing to opt out of receiving a paper copy may do so by sending an email to the Editor at pdeboor@gmail.com. The decision to opt out may be made or reversed at any time.

Dropping the Mute

By Peter de Boor, Editor

The purpose of a labor union is to achieve improvements for its members, by means of collective action. These improvements traditionally have been in terms of employment—wages, benefits, and work rules. But



historically they have not been limited to that, nor have the beneficiaries of the improvements been limited to the membership of the union that bargained them.

Any casual student of US history will remember the achievements of the standard eight-hour workday, paid sick leave, and the weekend brought about by many

different unions, striving for each incremental improvement, but all building on what others had previously achieved. And those who study economics know that in states where unions are stronger, average wages are higher for all workers, not just those in bargaining units. Similarly, comparing a graph of income inequality in this country over time with one of union membership would reveal a strong negative correlation.

Many Americans take for granted the structural change wrought by unions, and are thus susceptible to conservative talking points that unions are a drain on the economy, making it harder for businesses to innovate and even operate, stifling job growth, and essentially extorting money (i.e. union dues) from hard-working people. I once sat agape when an educated friend told me, upon her return from Michigan, that, “nothing works there . . . because of the unions.”

The many successes of the labor movement came at a great cost. Most dramatically, hundreds have been killed in labor actions over the years, mostly in the formative years of unions in the US. But millions more suffered crippling loss of income and benefits as a result of strikes and lockouts, and many more were blackballed for their organizing activity. We have only to look at the recent history of ICSOM to identify notable examples of sacrifice, such as the 16-month lockout of the Minnesota Orchestra.

Sometimes the costs are enshrined right in the resulting collective bargaining agreement. It’s probably obvious to all readers of *Senza Sordino* that tradeoffs are a necessity in negotiation, and that more often than not what is traded is not merely what one side aspires to (e.g. proposed wage increase) but what it already possesses (e.g. a work rule forbidding Sunday performances). In some instances, the achievements for one part of a bargaining unit come at the expense of others

in the bargaining unit. In the orchestral world we can readily identify some common areas where this dynamic has often been at play: principal overscale, cartage, or doubling, to name a few.

In my own orchestra, years ago we codified the principle that extra work (mostly musical theater) would be shared equitably among all the players, not doled out first to principals, then assistant principals, etc. This came at the direct expense of those principal players, who ultimately agreed that the resolution was better for the orchestra as a whole.

Arguably, the success of a union rests almost entirely on its willingness and ability to make these kinds of shared sacrifices for the cause. If members of the bargaining unit aren’t willing or able to remain on strike or locked out, solidarity can break down. The negotiating team may have to accept management’s final offer, or something close to it, no matter how odious it may be.

Perhaps by this point you’ve noticed a certain theme to this issue of *Senza Sordino*. Even a cursory glance at the cover page would tell the reader that this is not an ordinary issue. The Governing Board has devoted a great deal of time and energy to this push to pass the Butch Lewis Act because we feel it

is important. We feel that it is the best hope to preserve the AFM-EPF without cuts to earned benefits. We have asked for your help in this endeavor, namely communicating with your US senator. The sacrifice involved is a few minutes of your time and perhaps a few pennies of electricity. It pales in comparison to other sacrifices routinely made.

Perhaps you have principled or ideological reasons why you think that Congress should not pass this bill. If that’s the case, please do two things: write to me and explain your reasoning (my contact info is in the masthead on page 2), and then ignore the rest of this column,

as I would not want you to act against your principles.

(To my colleagues who live in the District of Columbia: We know that you don’t have any US senators. Have you considered asking your friends and colleagues who don’t live in DC to help out?)

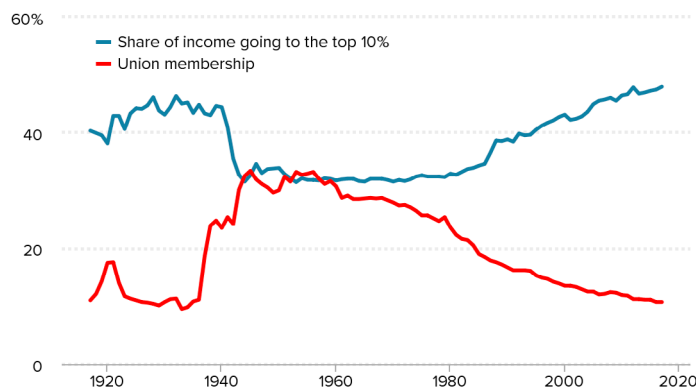
For the rest of you, suppose your orchestra were on strike, and only two people showed up for scheduled picketing. Do you think that management would give serious consideration to the union’s proposals at the next bargaining session?

That’s analogous to the situation we’re in now, where appeals to almost 5500 active and emeritus members of ICSOM have produced 776 responses. That means only about 17% of our active members and 7% of our emeritus members have responded to this call to minimal action.

Perhaps you think or know that your senator already sup- >

As union membership declines, income inequality rises

Union membership and share of income going to the top 10%, 1917–2017



Sources: Data on union density follows the composite series found in Historical Statistics of the United States; updated to 2017 from unionstats.com. Income inequality (share of income to top 10%) data are from Thomas Piketty and Emmanuel Saez, “Income Inequality in the United States, 1913–1998,” *Quarterly Journal of Economics* 118, no. 1 (2003) and updated data from the Top Income Database, updated March 2019.

Economic Policy Institute

ports it. Wouldn't it be great if they had a demonstrable show of support from their constituents to energize them?

Perhaps you think or know that your senator is firmly opposed to it. If they hear vocal support for the bill, it might weaken their opposition, and they might be amenable to a compromise of some sort.

Perhaps you think that this bill has no hope of passage in the Senate. In light of the current political alignment, that belief may be understandable. But given how little it will cost you—less than two minutes of your time, tops—perhaps you'd be willing to do it, if for no other reason than your brothers and sisters in ICSOM have asked you to do so.

Perhaps you've already written the emails, called your senators, and tweeted your support. On behalf of ICSOM, thank you! But now, perhaps you could ask your colleagues if they have done the same?

In light of the recent publication of a white paper, *Multiemployer Pension Recapitalization And Reform Plan*, by Senators Grassley and Alexander, it is even more important that our voices be heard. While the Governing Board has not yet formulated an official position on this white paper, my own initial reading of it is highly unfavorable, with its proposal for participant "copayments" and possible conversion of multi-employer pension plans into nothing more than uninsured defined contribution plans. But it might attract the support of senators who would otherwise have supported Butch Lewis—unless they hear your voice.

There's no question that the political and legal climate for

unions is more fraught than ever—just read Kevin Case's piece about recent NLRB decisions (page 3) to get an idea. And as we in the union movement struggle to protect and build on gains made by our predecessors, it can feel wearying and pointless (as acknowledged in Meredith Snow's chair report, "Apathy", on page 1). But these are the very reasons it is so important for us to engage more, not less. If we want our union to achieve, we have to participate.



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