

# Senza Sordino

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## Tiptoeing through the TNT: The Duty of Fair Representation

Those musicians fortunate enough to enjoy the manifold privileges of serving on orchestra committees (sharing bag lunches with management in basement rehearsal rooms, being chewed on by colleagues for sins too numerous to count, and the like) will no doubt be cheered to know that along with those perquisites come responsibilities. The bad news is that, as an arm of the certified bargaining agent for your orchestra's musicians, namely your local union, those responsibilities include the ability to make a big legal mess. Perhaps the biggest playground for potential mess-makers is the doctrine known as "the duty of fair representation." The good news is that a working knowledge of this doctrine will go far to help the worried committee member sleep soundly at night.

The certified union for a bargaining unit is granted an exclusive right under the National Labor Relations Act (NLRA) to represent all of the employees in that unit, members and non-members alike.

This exclusive rule, giving the union the right to represent all members, is the underlying basis for the imposition of the duty of fair representation. Along with this right goes the duty to represent fairly all of the employees of the unit, whether members of the union or not. Fair representation must be found both in the negotiation of the collective bargaining agreement and in its enforcement.

In a leading Supreme Court case, *Steele v. Louisville and N.R.R.*, a black railroad fireman asked the Court to set aside a seniority agreement negotiated by his union because it discriminated against minorities who were part of the bargaining unit. Although the Railway Labor Act, under which the union had exclusive rights to bargain for the employees, did not explicitly do so, the Court held that the Act implicitly imposed a duty on the union to exercise its powers fairly on behalf of all those for whom it acted. Later court decisions found that the NLRA imposed the same duty.

It is to be noted, however, that court decisions have acknowledged that contracts may legitimately have unfavorable effects on some members of the unit. The law does provide that such unfavorable effects cannot be the result of discriminatory treatment based on arbitrary, irrelevant, or insidious considerations, such as union membership or race. A union must consider all employees and make an honest effort to serve their interests in good faith and without hostility or arbitrary discrimination. The courts have held, in fact, that absent such a finding of bad faith, the courts may not question

the actual bargain struck by the union. It cannot be a breach of the duty of fair representation unless it is so far outside the range of reasonableness as to be wholly irrational.

Usually discrimination problems during contract negotiations can be easily detected and corrected. What may be more difficult to detect is whether the union has breached its duty of fair representation in contract enforcement; that is, whether the union chooses to follow the contract grievance procedure on behalf of the employee, and whether it pursues such grievances fairly. Under most collective bargaining agreements, the right to assert a violation of the agreement against the employer lies not with the individual employee but with the union. Court action against the employer usually cannot be taken unless and until the employee exhausts that grievance procedure or alleges and proves that he or she was prevented from doing so by the wrongful action of the union. Thus, fair treatment of the employee by the union administering a grievance is very important.

An employee must use the grievance procedure controlled by the union, but the employee does not have an absolute right to have a grievance pursued. In *Vaca v. Sipes*, the Supreme Court noted that a procedure giving the union discretion to supervise the grievance machinery and to invoke arbitration establishes an atmosphere for both parties to settle grievances short of arbitration. The parties are assured that similar grievances receive similar treatment; thus, problem areas under the collective bargaining agreement can be isolated and perhaps resolved. Therefore, a breach of the duty to represent an employee fairly occurs only if the union's conduct toward the member is arbitrary, discriminatory, or in bad faith. However, the Supreme Court also indicated in *Vaca* that a union can violate the

*continued on page 2*

### In This Issue

<b>OK Bud, where's the Presto?</b> . . . . .	<b>3</b>
<b>AFM Does Vegas</b> . . . . .	<b>4</b>
<b>Play with Your Mind</b> . . . . .	<b>5</b>
<b>Newslets</b> . . . . .	<b>6</b>

## Fair Representation

*continued from page 1*

duty if it processes a grievance in a perfunctory manner. “Perfunctory” means acting in a superficial manner without care or interest. In *Vaca*, the union had thoroughly investigated the employees’ grievance and had even sent the employee to another doctor for evaluation at the union’s expense. Thus the Court briefly noted that perfunctory treatment could be a violation but did not consider that aspect of the doctrine in detail because it was clearly inapplicable under the facts.

In *Hines v. Anchor Motor Freight Inc.*, however, the Court directly faced the perfunctory processing issue. In *Hines*, the employer discovered that certain drivers had turned in expense vouchers for motel rooms that, according to motel records, were higher than the amount the drivers had actually paid for the rooms. The employer, concluding that the drivers had pocketed the difference, discharged them. The drivers maintained that they had paid the full amount for the rooms. They told the union that the motel clerk must have altered the motel’s records and embezzled money from the motel. The union business agent processed the drivers’ case to arbitration. The drivers continued to maintain their innocence, but the arbitration board upheld the discharges.

The employees sued the union for breach of fair representation and the employer for breach of contract in the same suit, on the theory that their discharges had violated the just cause provision of the contract. During pre-trial proceedings, the motel clerk admitted that he had stolen the money and that the drivers were innocent, as they had claimed. The employer argued that the arbitration board’s decision was final and binding, even though the employees could now prove their innocence. The Supreme Court stated that normally an arbitrator’s decision, right or wrong, is final and binding on the employees. However, the Court held that an arbitrator’s decision is not binding on the employees if the union violated its duty of fair representation in processing the case. The Court concluded that the union had violated its duty because it had handled the grievances in a perfunctory manner by failing to check out the employees’ defense that the motel clerk was guilty.

The *Hines* case requires that a union investigate the merits when a grievance is filed; it cannot simply go through the motions. A union’s decision whether to proceed, drop or settle a grievance must be based on a consideration of the grievance’s merits and the advantages or disadvantages of proceeding. A grievance cannot be treated as a casual matter or processed as a matter of form without any interest or true consideration of its merits. So long as a union gives a grievance the consideration it deserves and does not deal arbitrarily, discriminatorily, or in bad faith with employees, the union’s decision, right or wrong, is not a violation of the duty of fair representation.

Some examples of breach of that duty are obvious. Discrimination because of race, sex, or nationality is clearly prohibited.

The merit of a grievance sought to be enforced by the employee is not paramount in a court’s review of a union’s actions. It is the actions of the union itself that the court will review. If the union, in good faith and without discrimination, determines that a grievance should not be pursued, or if it indeed properly processed the grievance, albeit unsuccessfully, it has not breached its duty to the employee.

An employee, however, who has been unfairly treated by the union has a cause of action against the union for the breach and against the employer for the underlying grievance. This occurs when the union has acted in bad faith and with discrimination in not pursuing the grievance.

In a recent Supreme Court case, *Bowen v. The U.S. Postal Service*, the Court apportioned the damages due the wrongfully discharged employee between the union and the employer by using the date of a hypothetical arbitration decision. All back pay prior to the hypothetical date was due from the employer; all back pay from that date to the time of settlement was due from the union.

The Court reasoned that, if the employee had been properly represented, the employer’s liability would have ended at the arbitration decision. All back pay benefits from that point onward were caused, and should be paid, by the union.

Orchestra committees function basically as “agents” of the Union, and many of them are the initial body which is charged with grievance handling. It is therefore important for musicians to understand these basic precepts.

The committee too must act in good faith, must investigate the grievance as fully as possible, in a timely fashion, and in most circumstances make an objective recommendation to the Union as to whether or not they believe the grievance has merit, together with their reasons and an analysis of any and all relevant contractual provisions. It must also be careful to keep the grievant informed as to the process and of its findings.

Just because the committee comes to the “wrong” conclusion, e.g. finds merit where none exists, or finds no merit where it does exist, will not normally constitute breach of the duty so long as the decision was arrived at after the investigation described above and in good faith.

The duty of fair representation is not always easy to define in a given case. This article is intended solely as a primer. Specific cases should be checked out with local counsel or ICSOM counsel.

*Leonard Leibowitz*  
ICSOM Counsel



Symphony Orchestra
Rehearsal Department Police

BEHAVIORAL VIOLATION

NAME OF OFFENDER

DATE/TIME OF OFFENSE

INSTRUMENT

LOCATION

Impersonating a Professional Fine

- Stupid Questions \$10.00
Really Stupid Questions \$25.00
Really Stupid Questions Which Increase Rehearsal Time \$300.00

Presumptuous First-Year Behavior Fine

- Musicological Elucidation \$25.00
Historical Nitpicking \$50.00
Obtrusive Foot Tapping \$10.00
Uninvited Conducting \$15.00
Questioning Concertmaster's or Principal's Bowings (strings) \$25.00
Comparing Concertmaster's or Principal's Bowings with What Philadelphia Did Under Ormandy (strings) \$100.00

Toadying Fine

- Insane Cackling at Conductor's Jokes \$50.00
Loud and Forced Horse Laugh at Conductor's Jokes \$10.00
Unwarranted Beatific Smile While Playing \$40.00
Conspicuous Professional Reading (e.g. International Musician) \$35.00
Stultifying Minute Bowing/Breathing Questions \$75.00
Conversing With Conductor in Language Other Than English \$95.00
Active and Public Nodding in Agreement With Conductor \$35.00
Pencil Behind Ear \$25.00
Conspicuous Part Marking \$15.00
Letting Pencil Clatter on Stand after Conspicuous Part Marking \$500.00
Obvious, Insipid Consultation of Conductor's Score During Break \$150.00
Reference to Obscure Recordings/Performances \$90.00
Pretending to Understand Absurd Metaphor \$15.00
Actually Understanding Absurd Metaphor \$25.00
Informing Conductor He's Got More Rehearsal Time Than He Thinks \$750.00

Annoying Behavior By Veterans Fine

- Playing High Notes Louder Than Possible (brass) \$25.00
Holding Same 1/4 Beat Longer Than Everyone Else \$200.00
Discussing Technique During Rehearsal \$100.00
Discussing Technique During Break \$200.00
Discussing Technique With Guest Artist (at any time) \$500.00
Tiresome, Time-Consuming Anecdotes \$30.00
Tiresome, Time-Consuming Anecdotes About Famous Musician (second-hand) \$60.00
Tiresome, Time-Consuming Anecdotes About Famous Musician (first-hand) \$90.00
Naming Yourself After a Dead Composer \$50.00
Naming Yourself After a Living Composer \$100.00
Feigning European Birth by "lapsing" into Foreign Languages \$150.00

General Obnoxious Behavior Fine

- Inviting Conductor to Party \$15.00
Inviting Guest Artist to Party \$100.00
Showing Pictures of Guest Artist at Party During First Service Following Party \$200.00
Warming Up Onstage More Than 30 Minutes Before Service \$50.00
Warming Up Onstage So Loudly No One Else Can \$100.00
Warming Up Backstage So Loudly No One Else Can \$250.00
Continuing to Tune Loudly After Everyone Else is Done \$10.00
Unnecessarily Obvious Insertion of Earplugs \$15.00
Conversing With Management (non-hostile) \$25.00
Fraternizing With Management \$250.00

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## Confessions of a Convention Virgin: Stranger in a Strange Casino

To this rank-and-file AFM member, Federation conventions had always seemed like rather distant and mysterious events. Being a newly-minted officer of an AFM local gave me the chance to experience the mysteries of both the AFM and Las Vegas first-hand.

Although the convention formally began on the afternoon of Monday, June 19, a number of delegates, as well as all the AFM officers, senior staff, and legal counsel, had already been in Las Vegas for several days, serving on the various committees that consider legislation to be placed before the convention. Most of the delegates arrived on Sunday afternoon or Monday morning, lending the lobby of the convention area an ambience of a 30-year high school reunion being held at a charter-flight check-in.

On Monday morning, a breakfast meeting was held for new delegates. There were around 40 such delegates in attendance this year, around 10% of the total convention attendance and up substantially from previous years, and they were a relatively diverse crowd in terms of age, gender, and ethnicity. All of the members of the AFM International Executive Board were present, and several of them spoke to the new delegates about conference procedure.

The most surprising aspect of the convention for this writer was the near-total dominance of legislative proceedings. Except for the standard welcoming speeches and a few reports (and, of course, the elections for officers), the convention concerned itself entirely with legislation. Virtually all of this legislation, moreover, was in the form of amendments to the AFM's bylaws.

Proposed amendments came in two flavors: "recommendations," which came from the IEB, and "resolutions," which came from local officers. Both recommendations and resolutions were distributed to delegates well in advance of the convention, as well as being printed in the *International Musician*. Recommendations and resolutions were considered by various committees (which, although authorized by the convention on Monday, were mostly up and running before the start of the convention), where testimony was heard and modifications considered before being brought to the convention as part of the various committees' reports. As one might expect, most of the recommendations from the IEB made it unscathed through the committee process, while many of the resolutions were brought by the committees to the convention floor with a negative recommendation. There were some instances of rather creative deal-making, though, that resulted in legislation blending elements of recommendations and resolutions on the same topic.

Unlike recent conventions, where the focus had been on the AFM's finances, the high point of this convention were the elections for officers. The hardest-fought campaign was between Steve Young, AFM vice-president and president of the Boston local, and Sam Folio, a member of the five-person AFM Executive Committee and the trustee of several locals, including Reno and Miami. While deconstructing the campaign rhetoric was especially challenging to

this novice to the arcane world of Federation politics, informed observers generally viewed the campaign as emblematic of the major fault line within the Federation, the split between small locals and large locals. Folio, who was nominated by a delegate from the smallest local in the AFM (Fond du Lac, Wisconsin, with 15 members), was generally seen as the champion of the issues that concern small locals, while Young was regarded as the "insider" candidate, with strong ties to the largest locals in the AFM. The campaign featured many of the accouterments of modern political campaigns, including direct mail, lapel buttons, and more than a dash of negativity. The race, which was viewed as being too close to call on Monday, resulted in a clear but not overwhelming victory for Young, who becomes the first musician from the classical music side to head the world's largest entertainment union.

Tom Lee, a member of the Executive Board and Secretary-Treasurer of Local 161-710 (Washington DC), defeated Richard Q. Totusek, best known to ICSOM delegates as the musicians' traveling parliamentarian ("Have Roberts, will travel"), in a race that was a model of courtesy. The three incumbent members of the Executive Committee running for reelection, Tom Bailey, Tim Shea, and Ken Shirk, all won. The two seats being vacated by Tom Lee and Sam Folio were won by Bill Moriarity, president of Local 802 (New York City), and Ray Hair, president of Local 72-147 (Dallas-Fort Worth). Steven Sprague, the incumbent AFM secretary-treasurer, cruised to an easy victory over nominal opposition.

*continued on page 5*

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### ICSOM in Vegas

Although Brad Buckley, Dave Angus, and Jim Clute, the three delegates from ICSOM, were sequestered in one corner of the vast ballroom along with the delegates from ROPA, OCSM, and RMA, their presence was felt throughout the convention. They could usually be seen in a hallway having quiet discussions with various Federation officials about legislation affecting the interests of ICSOM musicians. Their lobbying efforts on behalf of ICSOM were sufficiently effective that at no point did they need to exercise their right to speak to the Convention as a whole.

In addition, the three ICSOM officers helped organize a gala celebration of the AFM's centennial. This party, which was hosted by ICSOM and the other three Players' Conferences, was held at the *Top of the Riv*, the penthouse ballroom in the hotel, on Monday June 19, and featured Si Zentner and his orchestra. The centerpiece of the party was a ceremony honoring retiring AFM president Mark Tully Masagali. Although the event unfortunately coincided with the "Folio for President" campaign party, attendance was extremely good, with many of the delegates and virtually all of the officers and staff of the AFM making an appearance.

## AFM Convention

*continued from page 4*

While much attention was focused on the issue of the Federation's declining membership and how to fix it, perhaps the most interesting floor battle occurred over the issue of officers' compensation. The Finance Committee brought two recommendations from the IEB to the floor; the first was to raise the delegates' convention per diem (exclusive of hotel) from \$30 to \$50, and the second would raise the salaries of the AFM officers. The first recommendation, to the surprise of many, was defeated on the only standing vote of the convention. The second was headed for defeat when retiring president Mark Tully Massagli made a very emotional speech to the convention on the necessity of raising officers' salaries on grounds of both necessity and equity. His speech was universally credited with turning the convention around on the issue, and the recommendation to raise salaries was passed decisively on a voice vote.

The next day, however, there was a motion from the floor to reconsider the motion to raise the convention per diems which had been defeated the day before. This motion was passed, and the motion to raise the per diems was also passed on reconsideration. So, in the end, both the officers and the delegates got raises.

Other legislation of interest to ICSOM musicians included new language that would allow *only* Federation members to participate in orchestra meetings on contract or union matters, including contract ratification.

After the convention was adjourned on Wednesday afternoon, this delegate made it out of the hotel for the first time since his arrival on Sunday to reflect, in the midst of several thousand sightseers watching a pirate ship sink into the sunset, on his experiences. The dominant impression left after three days of meetings, lobbying in the hallways, and hurried dinners was the seriousness with which the delegates did the business of the AFM. The Federation has changed quite dramatically over the past decade or so; the new emphasis on organizing, the increasing diversity seen in its delegates, and its new president all prove that. There are many difficult issues yet to resolve within the AFM, but this new delegate left Las Vegas cautiously hopeful about the Federation's future as a home for all of America's professional musicians.

*Robert Levine*



Photo by Laura Brownell

*Representatives from ICSOM, ROPA, OCSM, and RMA gather in Las Vegas*

## Orchs Psychology

Musicians of the Syracuse Symphony Orchestra were recently privileged to attend group and individual sessions with sports psychologist Don Greene of the ProMind Institute.

Don, who holds a Ph.D. in psychology, served as the sports psychology consultant for the 1984 U.S. Olympic Diving Team, and works with a variety of professional athletes on performance enhancement. He met sso principal bassist Ed Castilano during the summer of 1993 in Vail, Colorado, where Ed was performing with the Rochester Philharmonic. While working on aspects of Ed's golf game, the two became fascinated by similarities between sports performances and music performances.

Working through our orchestra committee, Ed arranged Don's first visit to Syracuse in November 1993, where Don met with approximately 35 members of the orchestra in both group and individual sessions. The musicians completed the Artist's Learning and Performance Inventories, evaluative instruments developed by Don to provide focus and insight into individual performers' personal challenges. Following this, each musician met privately with Don to discuss the results and possible avenues for improvement.

Don returned to us this past April, administering a refined version of the Inventories, following up, as before, with individual interviews with musicians.

One-and-one-half months after the April session with Don—a session that was followed by several phone consultations—Brian Thomas, assistant principal horn with the sso for the past five years, won the second horn position with the Houston Symphony. In Brian's words, his work with Don Greene was "the final and significant part of the puzzle."

In reflecting on my own impressions of Don, based on personal interviews as well as several less formalized conversations with him, terms such as "intelligence," "sensitivity," and "quiet confidence" come to mind. I have met few people with whom I have felt so quickly relaxed and comfortable.

We in the Syracuse Symphony Orchestra who have benefited from Don's work look forward to future involvement, and we hope that our fellow musicians in other orchestras across the country will have a similar opportunity.

GERALD ZAMPINO

*Zampino is a member of the Syracuse Symphony*

Others clinicians and/or researchers in the field of music and arts psychology include Dr. David Sternbach (Washington DC), Dr. Peter Ostwald (San Francisco), Dr. Kyle Pruett (Yale University), and Dr. John Gedo (Chicago)—*Editor*.

## Newslets

The management of the **Buffalo Philharmonic** announced on June 23 that it would cancel most of the orchestra's summer season and would explore a merger of the orchestra's administration with the University of Buffalo Performing Arts Center or Shea's Performing Arts Center in an effort to lower costs.

Management canceled 25 of 28 concerts scheduled between July 3 and August 31. The only concerts not affected were a Fourth of July concert, a performance on July 3 at the downtown baseball park presented by the Buffalo Bisons, the local AAA baseball team, and a benefit concert on August 31 with humorist Mark Russell.

Executive Director John Bauser cited cash-flow problems, caused by reduced county funding and a drop-off in subscription sales for next season, and failure to reach agreement with the orchestra's musicians on a furlough plan as the reasons for the cancellation, the second such cancellation in two years.

Mark Jones, president of the Buffalo Musicians' Association, Local 92 AFM, which represents the 76 orchestra members, denied that there was a failure to reach an agreement with management on the furlough issue. "I have in my possession a signed agreement between the union and John Bauser dated June 9—just two weeks ago—agreeing to the furlough plan," Jones said. "How can you sign an agreement, if these (funding) problems do exist, and then 11 days later say we don't have an agreement?" asked Jones. "It's mind-boggling."

Jones placed the blame for the current situation on Bauser and expressed dismay about the abrupt nature of management's

announcement. "No one was told about this. Not the Union, not ArtPark [the BPO's summer venue]. When I picked up the message on my answering machine, I thought somebody was pulling my leg."

Although recent cuts in state funding for the orchestra have been partially restored, BPO board president William L. McHugh said that the net loss of \$173,000 was too big a burden for the orchestra to overcome. "Under these circumstances, it is not responsible to go forward, losing money on each event," he told the *Buffalo News*.

Bauser, who is leaving the orchestra on October 1, told the paper that "everything we're doing now is designed to preserve [the winter season]." Canceling the summer concerts "is a disappointment for me, the musicians, and the board."

The musicians and management reached an agreement last June, after the orchestra suspended operations on May 9, that provided for a pay cut of 5%, a cut in health benefits, and changes in work rules. As part of the agreement, the musicians got six seats on the twelve-member Executive Board.

David Midland, president of ArtPark, told the *Buffalo News* that he was "appalled" by Bauser's contention that the cancellation was due to reductions in state funding, writing that "after the New York State budget was announced in February, ArtPark and the BPO agreed to a format for 1995 to include 16 Philharmonic concerts. This agreement was signed by ArtPark on April 14 and returned, signed by the BPO, on June 10 . . . indeed, I had assurances from the BPO's executive director that they would not cancel concerts this summer, despite rumors to the contrary."

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