PROGRESSIONS

Official publication of the Reno Musicians' Union, Local 368 **Volume 2016, Issue 2**

UNITY • HARMONY • ARTISTRY

Inside this issue:

2016 is an election year for Local 368. Every two years all your board officers and board members are elected. Look at page two to read what our bylaws direct us to do for electing you board members and officers.

This is also an important election year for the United States. At this years' AFM convention the delegates did not recommend or endorse candidates for any political office and I am very happy that we did not. The last time the AFM delegates endorsed a candidate there was a lot of disagreement within the rank and file members and some members left the AFM. It took me awhile to come to this conclusion but, thanks to discussions with some of you, I now feel that we (Local 368 nor the AFM) should not be endorsing political candidates or taking sides. Although we should support politicians that support musicians and musician causes such as copyrights, Rights to Organize and Fair Trade Music. It's a tough call on exactly how to do that but I think we can figure out who and what to support with out looking like we are taking a side. The Tempo Fund is one way and I suggest that you donate to this Political Action Fund for musicians that works on improving the working lives of musicians. Also if you have not been to the new AFM web page you might want to: http://www.afm.org/ It has a new fresh face and lots of information for working musicians.

Please update us when you move!

Make sure you send us any change of address, email or phone #.

YOUR LOCAL 368 BOARD MEMBERS

President-Sec./Treas.: John Shipley **Vice President:** John Beckman

Board Members: Paul January**,** Peter Supersano, Catherine Matovich Dave Gupton, and Linda Arnn-Arteno Alternate

MEMBERSHIP NEWS

We would like to acknowledge these new members to Local 368:

Gerard Gibbs

These members were dropped for non-payment of dues:

Bruce McBeth, Robert Lightfoot, Alfred "Hank" Currey

These members resigned:

Charles Taggart

This information officer elections is from our Local 368 Bylaws and is about how we are to conduct our elections.

Nominations

Nominations for all Officers, Delegates to the Federation Conventions and Conferences of the AFM shall be opened and closed at the October meeting immediately preceding the elections every two (2) years. At least fifteen (15) days prior to the nominations meeting, the Secretary-Treasurer shall mail written notice of such meeting to all members. The notice shall contain the date, time and place of the meeting and the positions subject to nominations. The notice of the nomination meeting also should specify the date, time and place for the election.

The nominations meeting shall be held as called, regardless of any quorum requirement.

Any Full Member in good standing at the nominations meeting shall be entitled to nominate any eligible candidate of his/her choice. The nominee shall be present at the meeting or his/her nominator must present a written signed statement of acceptance of nomination from such nominee.

To be eligible for nomination a member must have been a member of the American Federation of Musicians in continuous good standing for at least one (1) year immediately preceding the election.

Elections

Election of all elective offices shall be held every two (2) years, at the headquarters of Local 368, in the month of December.

Election of Officers, Executive Board Members and second (2nd) Delegate shall be by Secret Ballot vote mailed to the Local 368 Membership.

Ballots

Names of the candidates shall be arranged on Ballots in alphabetical order for each of the following offices: President, Vice-President, Secretary-Treasurer (Delegate by virtue of office), three (3) Executive Board Members and second (2nd) Delegate.

In preparation of Ballots for any election of Local 368, immediately under the name of a candidate for reelection must appear the word “incumbent”. The Secretary-Treasurer shall preserve election results for one year following the election.

Biennial elections shall be conducted by either: an Election Committee; or the American Arbitration Association or similarly accredited organization. Determination will be made by the Executive Board.

No sooner than forty-five (45) days nor later than thirty (30) days before the election, the Election Committee (or bonded representative of Local 368) shall mail each Full Member an official ballot with instructions and two envelopes. One envelope shall be marked only with the word “BALLOT”; the other envelope shall be larger, shall be pre-addressed to the Election Committee at a Post Office Box to be secured by the Secretary-Treasurer; and shall have on its reverse, printed lines identified for the member to sign and give his/her address.

Writing of names of persons not nominated or listed on the Ballots is prohibited and will result in void vote for that office.

On election day the Election Committee (or bonded representative of Local 368) shall pick up all ballots returned to the Post Office Box, verify the validity of each from the list of Full Members in good standing and then open envelopes and tally votes, after which each representative shall sign the vote tally sheet(s) which the chairman shall give to the Secretary-Treasurer who shall publish results to the Full Member.

A plurality of votes cast shall elect a candidate to office.

Newly elected officers shall assume office at the first meeting in January of the Executive Board.

Any candidate dissatisfied with the count of election board shall have the right to a recount upon filing with the Secretary-Treasurer within five days of said count, a petition signed by ten members who voted at the election. Recount of all Ballots cast at said election shall be final for any office. If a recount petition is not presented to the Secretary-Treasurer within five days of said election then the count of the Election Committee shall be final.

A LOCAL 368 NOMINATION MEETING FOR BOARD OFFICERS AND EXECUTIVE BOARD MEMBERS WILL BE HELD ON:

MONDAY, DECEMBER 5, 2016 AT 7PM

THIS MEETING WILL BE HELD AT OUR OFFICE AT:

989 BIBLE WAY RENO, NV

IF YOU ARE INTERESTING IN RUNNING FOR OFFICE OR SITTING ON THE LOCAL 368 EXECUTIVE BOARD PLEASE COME TO THIS MEETING OR HAVE SOMEONE PRESENT TO NOMINATE YOU!

FOOD FOR THOUGHT

There are more love songs than anything else. If songs could make you do something we'd all love one another.

- Frank Zappa

Talent works, genius creates.

- Robert Schumann

Too many pieces of music finish too long after the end.

- Igor Stravinsky

YOUR MEMBERSHIP DUES AT WORK

Just so you can see where your membership monies go, I have prepared a breakdown of the expenses your local spends on your behalf. Out of the $40 per quarter of regular membership dues paid by our members the local pays out these amounts per quarter:

$16.50 per capita payments to the International AFM

$6.00 for a $1000.00 Life insurance policy for each member (as required by the Local 368 bylaws)

$8.40 is spent per member on rent. ($280 per month total-this is dirt cheap!)

$15 per member is spent on my meager monthly salary

For a grand total of:

$45.90 spent by the local on each member every quarter.

When a member gets behind in their dues it puts us in the red quite a bit. Of course we do get your work dues and we do thank you for that, because without those monies from our members that work under a Union negotiated Collective Bargaining Agreement we would go under.

So in short if you could get up to date with your membership dues you would help us with our plans for the future of this Local.

Please know that I am always available to assist you with any and all concerns with the membership of Local 368. Please call me if you have any concerns or questions. The best way to reach me is by calling my cell phone: 775/219-9434 or you can leave a message on the office phone: 775/329-7995

- John Shipley

We are now live! Go to http://nvmusicianshalloffame.com to nominate your favorite Nevada musicians. “The Nevada Musicians Hall of Fame” is a website created to honor musicians of all genres and time eras that have played in Nevada’s concert halls, showrooms, lounges, and bars. This website has been created and paid for by Locals 368 Reno & 369 Las Vegas.

Congratulations, You're an Employee. (Right?)

by Kevin Case— *From the "Senza Sordino" the Official Publication of the International Conference of Symphony and Opera Musicians*

In April, the D.C. Circuit Court of Appeals issued a landmark ruling for professional symphonic musicians. In upholding the NLRB's determination that the musicians of the Lancaster Symphony are employees—not independent contractors—the Court settled the question once and for all. Symphony musicians are entitled to all the rights and protections that accompany employee status. It is now crystal clear.

Or is it?

Fourteen years ago, the Eighth Circuit Court of Appeals, a Court on the same "level" as the D.C. Circuit Court (one level below the U.S. Supreme Court), reached precisely the opposite conclusion: symphony musicians are independent contractors—not employees.

So . . . which is it?

The answer requires an understanding of two concepts: first, the method by which courts determine whether a worker is an employee or an independent contractor; and second, the standard of review that federal appellate courts (like the D.C. Circuit and the Eighth Circuit) utilize when reviewing decisions of lower courts and agencies like the NLRB.

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The independent contractor vs. employee question has been very much in the news with the rise of the so-called gig economy. Most notably, Uber drivers have been pushing back, hard, against Uber's position that they are independent contractors. Several class actions have been filed, in various states; one was recently settled, in California, with Uber agreeing to pay $100 million to the plaintiff drivers. Significantly, Uber did not admit the drivers are employees, and the settlement has yet to be approved by the district court (and has been bitterly criticized by some of the original plaintiffs).

The distinction is hugely significant. Employee status comes with a host of rights: the right to unionize and bargain collectively for terms and conditions of employment; protection under federal and state civil rights statutes that prohibit discrimination on the basis of, among other things, race, gender, age, or (in blue states at least) sexual orientation and gender identity; the right to unemployment benefits and workers comp; and more. But if a worker is classified as an independent contractor, the worker is entitled to none of those rights and protections. He or she is essentially deemed to be taking part in an arms-length business transaction, on an equal footing with the "employer". The law views the relationship as one business contracting with another business; the terms of the transaction are governed only by the free market.

Courts have long used a legal test for determining employee status that looks

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at a number of factors, including the "extent of control" the employer has over how the work is performed, the amount of skill required, whether the worker supplies his or her own tools, the length of time the worker provides services, how management and the worker subjectively view their relationship (particularly as reflected in their agreements), and the method of payment and tax treatment.

The weight courts place on each factor varies considerably. Officially, courts maintains that "no one factor is determinative." Generally, though, the element of "control" is often the most important. That makes sense: whether a worker is directed and supervised in his or her work, and told what to do and how to do it, should be of greater significance than whether, for example, an employer sends out a W-2 or a 1099-MISC at the end of the year. But courts are far from consistent. As with many multi-factor legal tests, it often seems that a court places more weight on a particular factor simply to justify the result the court has already decided it wants to reach.

When a party reaches the end of the road with the NLRB and is unhappy with the outcome, that party can appeal the NLRB's ruling .

Which brings us to the two decisions mentioned above. First, the good news: In *Lancaster Symphony Orchestra v. NLRB*—the decision handed down by the D.C. Circuit in April—the musicians of the Lancaster Symphony attempted to organize. (AFM Local 294 filed a petition for certification with the NLRB.) Management challenged the petition on grounds that the musicians were independent contractors, not employees, and thus had no legal right to join a union. Although an NLRB Regional Director initially sided with management, the NLRB ultimately ruled that the musicians were employees and could elect to join the AFM.

When a party reaches the end of the road with the NLRB and is unhappy with the outcome, that party can appeal the NLRB's ruling directly to the federal Circuit Court of Appeals (the appellate court that sits in between district courts and the U.S. Supreme Courts). But appeals from federal-agency rulings are treated differently than appeals from a district court. For agency appeals, the Circuit Court applies a certain level of deference to the agency's determinations—the rationale being that the agency has been charged by Congress with regulating a specific area of law. In contrast, an appeal from a lawsuit ruling, depending on the circumstances, is often viewed *de novo*—that is, the Court of Appeals looks at the judgment as if viewing the evidence for the first time and coming to its own conclusion, independent of and without any deference to the court below.

So in *Lancaster*, the prism through which the Court applied the multi-factor independent contractor/employee test was colored by the deference it was required to show to the NLRB's decision. The Court considered many of the usual factors, but focused (as most courts do) on the element of control. The Court noted that in a symphony orchestra, the employer "regulates virtually all aspects of the musicians' performance." Not only are musicians required to exhibit a certain level of decorum, but—and this is the money quote—the "conductor exercises virtually dictatorial control over the manner in which the musicians play."

Conversely, the Court noted factors suggesting independent contractor

Congratulations, You're an Employee.—Continued

status: playing in a symphony orchestra clearly requires a high level of skill; the musicians in the Lancaster Symphony were employed for only a brief period of time; and the musicians' personal service agreements said they were independent contractors and taxes would not be withheld. The Court also examined a factor that courts are increasingly looking to: the extent of a worker's "entrepreneurial opportunities" to work for other companies, sell or assign their role to others, hire their own employees, etc. But the Court concluded that this factor provided only "miniscule support" for the notion that musicians are independent contractors. (After all, it's not as if the principal clarinet can sell his or her spot in the orchestra, or hire someone else to help play the hard parts.)

Adding up the tally, the Court found that while some factors (especially the control factor) weighed in favor of employee status, others weighed in favor of contractor status. But rather than use its own independent judgment to decide which factors tipped the scale, the Court deferred to the NLRB: "Because the circumstances of this case thus present a choice between two fairly conflicting views, we must defer to the [NLRB's] conclusion that the Orchestra's musicians are employees."

That deference is what distinguishes *Lancaster* from the bad-news case: the Eighth Circuit's decision in *Lehrol v. Friends of Minnesota Sinfonia*. There, two musicians who were terminated from the Minnesota Sinfonia (an orchestra of free-lance musicians) brought suit alleging gender and disability discrimination. As in *Lancaster*, the case turned on whether the musicians were "employees"—because independent contractors aren't permitted to bring such lawsuits. Unlike *Lancaster*, however, the Court's standard of review in *Lehrol* was *de novo*, because the district court had granted summary judgment in favor of the employer (i.e., a judgment based solely on the evidence produced in the discovery process, without a trial). When a summary judgment ruling is appealed, a reviewing court looks at the case with fresh eyes and no deference to proceedings below, and reaches its own independent conclusion.

But even apart from applying a different standard of review, *Lehrol*'s analysis departed from *Lancaster* in several ways. First, the Court construed the element of "control" as referring not to how musicians are controlled in the workplace, but whether they have the ability to decline certain concerts and accept other gigs. Second, the Court put a great deal of emphasis on factors usually afforded little weight—for example, the Court declared it "highly significant" that management did not withhold taxes.

If that sounds like nonsense, well, it is. *Lehrol* is an embarrassingly bad decision. The Court's interpretation of "control" defies logic and reveals an utter ignorance of how musicians actually work. And it is plain silly to deny civil rights protection on the basis that the employer unilaterally decided not to withhold FICA. But *Lehrol* has not yet been challenged and overruled, which means that *Lehrol* and *Lancaster* are the only two federal appellate court decisions that have

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spoken to this issue—with opposite outcomes. For its part, the *Lancaster* Court noted *Lehrol* and the discrepancy with its own conclusion, but explained (unconvincingly, in my view) that there was no conflict because (1) the *Lehrol* case was a civil-rights case, not a labor case; and (2) the standard of review was different.

The result is remarkable: a musician can simultaneously be both an employee and not an employee. In a proceeding before the NLRB on an unfair labor practice charge, the musician is an employee. But if that same musician is alleging racial discrimination in a lawsuit, the musician is an independent contractor. Go figure. At some point the viability of *Lehrol* will be challenged. The *Lancaster* decision should help with that; despite the different standard of review, the Court's conclusions regarding the element of control are spot on. (Ask any orchestral musician how much "control" they really have at work—especially vis-à-vis the conductor.) *Lancaster* will be persuasive to other courts that consider the issue.

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More importantly, however, the impact of *Lancaster* on the day-to-day lives of musicians is significant. It is now clear under federal labor law that orchestral musicians, even in smaller, "freelance" orchestras, are employees and have the right to unionize. *Lancaster* renders *Lehrol* irrelevant on that point. But does it apply to every orchestra, no matter how small? Quite possibly. Every circumstance is different, and the employee-status factors will vary from case to case; but the element of control is conceptually no different in an orchestra that presents six concerts a year than in one that presents a hundred.

What about subs and extras? Is a musician who subs only occasionally in the course of a season an "employee"? For purposes of federal labor law, the answer has been "yes" even before *Lancaster*. In an earlier decision, *Seattle Opera v. NLRB*, the D.C. Circuit upheld the NLRB's ruling that alternate choristers in the Seattle Opera chorus were employees.

Again, the element of control carried the argument: the choristers were subject to "attendance and decorum requirements," and required to "follow musical and dramatic direction" on stage. What *Lancaster* does is reinforce the analysis in *Seattle Opera*— indeed, *Lancaster* explicitly discussed *Seattle Opera* in support of its conclusions with respect to symphony musicians.

I suspect that the reaction of many musicians reading this and other articles about *Lancaster* might be to say, "duh." Musicians have always known that their autonomy essentially ceases when they set foot on stage. They know how absurd it would be to view musicians as engaged in an arms-length business transaction when rehearsing a Mahler symphony. But now we know that the law—or one important court, at least—sees it the same way.

by Kevin Case

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