

The AFM Notice On Union Security: What Does It Mean To AFM Members?

by Sam Denov

At least thirty-five years after the fact, the American Federation of Musicians has finally acknowledged that a musician does NOT have to be a member of the union in order to be employed under the terms of a collective bargaining agreement containing a union security provision. A union security provision is that part of the collective bargaining agreement that appears to require that you join, or remain a member of, the union in order to keep your job. That has not been necessary since 1963!

NOTICE IN JUNE 1998 INTERNATIONAL MUSICIAN

The AFM's startling revelation appeared on page 2 of the June, 1998, issue of its journal, the International Musician, under the banner: "Notice to Musicians Who Are Employed Under U.S. Collective Bargaining Agreements." Of all the various provisions in our collective bargaining agreements, the least understood, and probably most abused, is the union security provision. There are a number of reasons for the confusion and the abuse, not the least of which is that the statutory authority for this provision was drafted by the Congress in a manner that appears to be completely contradictory and irrational.

It has therefore been the job of the courts to interpret what those provisions really mean. That has been going on now for many years, and even as this was written, the U.S. Supreme Court took a step backwards and handed down still another opinion which authorized the use of union security agreements based upon the statutory language of Sec. 8(a)(3) of the National Labor Relations Act (NLRA), even though that language does not mean what it says, and could arguably deceive the uninformed. That opinion, *Marquez v. Screen Actors Guild*, was delivered on November 3, 1998. The *Marquez* case was taken on for review by the Supreme Court because of the conflicting rulings on this subject by various federal Circuit Courts of Appeal.

UNION SECURITY CLAUSE

To understand this subject, as well as what is inadequate about the AFM notice, we have to know the history of union security. Let's look at a typical union security provision from a recent symphony contract. There is probably such a clause in your orchestra's agreement. This type of clause is not based upon Section 8(b)(2) of the NLRA as the AFM notice claims. "Any Employee who, on the effective date of this agreement, is a Member of the Union, and any Employee who becomes a Member of the Union during the term of this Agreement, shall, as a condition of employment with the Employer, remain a Member of the Union in good standing during the term of this Agreement. Any person becoming an Employee after the date of this Agreement shall, as a condition of employment with the Employer, become a Member of the Union no later than the 30th day following the date of first service with the Orchestra, and shall remain a Member of the Union in good standing during the term of this Agreement."

HISTORY OF UNION SECURITY

Union security first became law with the enactment of the NLRA in 1935. That was one of a number of Congressional acts that was initiated by U.S. President Franklin D. Roosevelt's administration during the depths of the

Great Depression. Those of us old enough to remember those bad times fully understood the need for these reforms. The NLRA, as part of Roosevelt's "New Deal", was enacted at the same time as the Social Security Act and a number of others that changed the social fabric of the United States. Under the NLRA's Section 9(a), unions were granted the right to be the exclusive representatives of all the employees in a defined bargaining unit for all purposes of collective bargaining, including the setting of wages and other terms and conditions of employment. To make sure no employer would discriminate against its employees who wanted to be represented by a union, Section 7 of the NLRA conferred certain rights on employees. Section 7 reads: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this title."

"UNION SECURITY" BECOMES "COLLUSION WITH EMPLOYER"

The problem, however, is this. How may an employee refrain from exercising any of the rights spelled out in Section 7, when Section 8(a)(3) of the same Act permitted unions and employers to enter into an agreement that required an employee to become a member of the union in good standing, and to remain such during the life of the contract, as a condition of employment? That contradiction in terms is at the root of all the problems that have arisen regarding union security, because a contracting union had the lawful right to seek an employee's discharge if that employee was not, or did not become, a member in good standing of the union. That is what is meant by ". . . as a condition of employment."

"FINANCIAL CORE" DEFINED BY SUPREME COURT

Unknown to musicians, and most other employees as well, was the fact that the U.S. Supreme Court, in *General Motors v. NLRB*, 373 U.S. 734 (1963), defined what was meant by "union membership" in the context of a union security clause. In doing so, it built on an earlier opinion, *Radio Officers v. NLRB*, 347 U.S. 17, (1954), that held that an employee satisfied the terms of a union security agreement if that employee merely paid the union its uniformly required dues and initiation fees, the same as all other employees. Actual membership in the union was not required, but the payment of dues was! The Supreme Court, in *General Motors*, had thus stripped required "union membership" down to its "financial core!" This right, to NOT be an actual member of the union, became known as the "General Motors" right, and the non-member employee was referred to as a "financial core" employee. Not being a member of the union, that employee was no longer subject to the union's rules or its discipline. All of this happened 35 years ago.

UNION DUTY OF FAIR REPRESENTATION

After the *General Motors* case, some unions refused to fairly represent some employees who chose NOT to be members, even though Section 9(a) of the

NLRA required unions to represent ALL the employees in a bargaining unit. It was implied that all employees would be represented fairly, in good faith, and without prejudice or discrimination. That situation gave rise to a case entitled *Vaca v. Sipes*, 386 U.S. 171 (1967). In that case, the U.S. Supreme Court created what is now called the "duty of fair representation." All bargaining unit employees were now to be represented fairly by their union in the negotiation and implementation of the collective bargaining agreement, whether the employees were union members or not!

RESTRICTIONS ON RIGHT TO RESIGN RULED UNLAWFUL

Generally, as far as private sector employees were concerned, that was where the law stood for a number of years, except for one other wrinkle. Some unions were restricting the right of their members to resign. Again, the Supreme Court handed down an edict. In *Pattern Makers v. NLRB*, 473 U.S. 95 (1985), the Court ruled that the right to resign from actual union membership, and to be free from further union control and discipline, was virtually absolute. An employee was free to resign from his or her union at any time, for any reason or no reason at all, even before a strike! However, that employee still had to pay the equivalent of union dues, which was called an "agency" fee, if there was a contractual union security provision. That all changed when the following case was decided.

RESTRICTIONS ON DUES

In *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), the Court handed down a landmark ruling deciding that employees who were not members of the union had the right to object to the payment of full union dues, or their equivalent, that was beyond their pro rata share of the expenses the union could prove was necessary for the bargaining and administration of their collective bargaining agreement and the processing of grievances thereunder. An employee could also choose to simultaneously resign from the union and object to the payment of full dues. After the filing of such an objection with the union, a non-member employee has the right to have his union dues reduced to what is legally chargeable, and the union has a duty to inform that employee how those determinations were made, with enough specificity to permit the employee to intelligently decide whether to agree or disagree with the union's calculations. In the event of a disagreement, disputed amounts of dues must be placed in an escrow account so that the union has no use of the disputed funds until the dispute is resolved.

AFM ARBITRATION REQUIREMENT UNLAWFUL

Many unions required such objecting non-members to proceed to union paid arbitration to settle such disputes, as the AFM notice requires. The U.S. Supreme Court, however, has recently decided, in *Air Line Pilots Association v. Miller*, 97-428 (1998), that unless the objecting non-member voluntarily agrees to such a procedure, there is no requirement to follow such union rules, which often resulted in one-sided opinions in favor of the union. The objecting non-member is now free to go directly to the federal courts, or the National Labor Relations Board, to settle such disputes. The rationale that the court used to justify this scheme was that no employee should be compelled to financially support causes that the employee did not agree with. But, neither should the non-member employee become a "free rider" who received the benefit of union-won working conditions and wages without

paying for the cost of such representation. To require compulsory full dues from an employee in order to support political, social, or organizational causes an employee disagreed with was deemed tyrannical, and violated employees' constitutional rights of free speech and association.

DUES SQUANDERED ON PURPOSES OTHER THAN CONTRACT

In the case of Beck and the other AT&T employees who filed their case against the CWA, it was determined that only 22% of full union dues was actually being spent on bargaining and administering the contract and the processing of grievances. Those employees were thus obligated to pay an agency fee equal to only 22% of the dues that other AT&T employees (who are union members) were required to pay.

NOTIFICATION OF RIGHTS REQUIRED

The National Labor Relations Board, the agency that administers the NLRA, currently requires, under their decisions in *California Saw & Knife Works*, 320 NLRB 224 (1995) and *Weyerhaeuser Paper Co.*, 320 NLRB 349 (1995), that contracting unions who have bargained a union security provision in their contract must notify those it represents what "union membership" really means in accordance with employees' "General Motors" rights, which also includes the right to resign from union membership or to not join in the first place, and must also disclose to employees what their "Beck" rights are. If your contract doesn't meet those standards, there is a probability that your union security provision is not lawful. That is because it misleads employees as to their obligations to financially support the collective bargaining representative. There is also one other subject that must be mentioned here, and that is the law in so-called "Right to Work" states. The AFM notice glosses over this subject without explaining it. Section 14(b) of the NLRA permits individual states to ban or outlaw union security provisions in labor agreements altogether. In those states, all union membership, as well as the payment of dues, is strictly VOLUNTARY. Those states are: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wyoming.

VOLUNTARY UNIONISM: "UNION SHOP" ILLEGAL

The upshot of all the above is that this nation now has a federally enforced scheme of voluntary unionism. What was known as the "union shop" is now dead, replaced by the "agency shop." Up until June, 1998, the AFM, like many other unions, had led their members to believe otherwise. While none of us want to believe it, there are many unions, and employers, who would like you to go on believing that you have no choice in these matters and that you must be a member of the union. Apparently, that is what the AFM wanted. That has all ended now. In many of the cases where unlawful union security provisions exist, it was because the union and employer had conspired to keep employees in the union against their will, where they could be controlled by the exercise of union discipline. That was of unlawful benefit to both union and employer in such cases. The union received the employees' full dues without having to really earn them, while the employer benefited from knowing that the union would not let employees' activities get out of hand when "push" comes to "shove." After all, there is no legal requirement that an employer agree to an unlawful union security provision

in its collective bargaining agreement with the union. On the contrary. Chief Judge Richard A. Posner, speaking for the 7th U.S. Circuit Court of Appeals said it best in his dicta from the Court's ruling in *Wegscheid v. U.A.W.*, No. 95-3385 (June, 1997), ". . . we emphasize that nothing we have said has been intended to suggest that unions and employers have a privilege to incorporate the language of section 8(a)(3) of the NLRA into their collective bargaining agreements if the consequence is to mislead employees. This language does not mean what it says, and if its inclusion without appropriate qualification misleads employees, either by itself or in conjunction with other misleading representations, the union cannot hide behind the fact that it is, after all, the words of Congress that it is repeating."

AFM "COMPLIANCE" FLAWED

It is now high time that all unions, including the AFM, actually earn employees' trust and confidence if they want to retain them as members. It is also high time that employers stop conspiring with unions, for their own mutual benefit, to deprive employees of their rights. We have now seen the AFM's first feeble attempt to comply with the law, even though the Beck decision was handed down more than ten years ago. Let's look at some of the flaws in the union's June, 1998, notice. The AFM notice tells us that the Beck rights apply only to those musicians who have resigned from the union. That simply isn't true. The Beck rights apply to all non-members, including those few who never joined the union. Apparently, the AFM has lost sight of the fact that a musician who never joined the union, as well as all musicians who have resigned from the union, have no duty to abide by any rules promulgated by the union, including having to submit disputes over agency fees to a union selected arbitrator. The AFM also neglected to mention the fact that moneys in dispute must be placed in an escrow account until the dispute is resolved. The offer of a rebate, by itself, is not good enough, simply because it allows the union to continue to collect full dues after the former member has resigned and objected to paying full dues, until it decides to pay a rebate. That gives the union temporary use of dues money that it is not entitled to, *Chicago Teachers Union v. Hudson*, 474 U.S. 292 (1986). In addition, if the AFM requires a non-member to renew his or her objection to the payment of full dues annually, then at a minimum, the union must also give the employees of the bargaining unit annual notice of their "General Motors" and "Beck" rights. However, some courts have declared such annual renewals as nothing but another stumbling block erected by unions to mislead and deprive you of your dues, unlawfully. It is interesting to note that the AFM, back in 1988, the year the Beck case was decided, placed a notice in the *International Musician* stating that it intended to fully comply with that decision. You may well ask -- what took so long?

PROPER NOTIFICATION: THROUGH CONTRACT

The biggest problem, of course, is that only current members of the union will even see the notice in the *International Musician*. What about those musicians who resigned some time ago, or those who never joined, as was their right? Notices, like that in the *International Musician*, are supposed to go to ALL employees! Non-members will not receive any notice at all, belated though the AFM recognition of the law is. For the AFM notice to have any practical effect and application, employers with whom the AFM has a contract still have to agree to a change in their contracts. Some courts have ruled that such notices, without changing the actual language of the

contract, are insufficient. The AFM cannot unilaterally change a term of the contract any more than an employer can. The AFM can, however, amend its By-Laws and policy relating to union security, which they have not announced they will do. What they are really saying in their recent notice, without actually putting it into words, is that they will no longer give any force or effect to the illegal union security provisions in their contracts. But, the AFM is not the legal entity with which your symphonic, operatic or ballet orchestra employer has a contract. That is your local AFM union. Those contracts remain unchanged and thus far, unaffected!! Let's face it; the AFM's pathetic attempts to comply with current applicable law, by any independent standard, simply aren't good enough!