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September 10, 2019

Nancy Wilson
Acting Regional Director
National Labor Relations Board, Region 5
100 S. Charles Street
Suite 600
Baltimore, MD 21202

Re: Baltimore Symphony Orchestra (Local 40-543, AFM) Charge

Dear Acting Regional Director Wilson:

This initial statement is submitted by Local 40-543, AFM (the “Union”) in support of its charge filed on September 10, 2019 against the Baltimore Symphony Orchestra (the “BSO”) concerning the BSO’s failure to bargain in good faith. Specifically, the BSO has unilaterally implemented changes to employee wages without reaching impasse. To achieve this unilateral implementation, the BSO locked out bargaining unit employees from June 17, 2019 to September 9, 2019. Additionally, the BSO has refused and failed to provide relevant information requested by the Union.

Factual Background

The BSO and the Union were parties to a collective bargaining agreement which was originally set to expire on September 9, 2018. On October 30, 2018, at the parties’ second bargaining session, the BSO presented a 72-page proposal including an entirely re-written contract with complete sections of the expired contract deleted. This proposal included a reduction in payroll weeks from 52 to 40, a loss of 27% of income and benefits for bargaining unit employees. Given the BSO’s claims that these pay cuts were necessary due to the BSO’s inability to fund a 52-week program, the Union, with some support from the BSO, began an effort to obtain funding from the Maryland State General Assembly. After an agreed upon contract extension expired on January 15, 2019, the parties held bargaining sessions on March 5, 2019 and April 5, 2019. Both sessions were focused on the recent efforts to obtain funding from the state legislature and collective approaches to obtaining this funding. The Maryland State Legislature voted to provide the BSO with an extra \$1.6 million funding support in each of two years and to create a work group. The bill became law on May 24, 2019 but to date the Governor has not released the funds authorized.

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On May 30, 2019, with no notice, the BSO announced that it would be cancelling its summer season and reaffirmed its October 30, 2018 proposal to cut the contractual payroll period from 52 to 40 weeks.

On June 13, 2019, before the parties had even met to discuss the implications of the cancellation and the BSO's reaffirmation of its October 30 proposal, the BSO publicized that it intended to lockout employees beginning on June 17, 2019. The BSO stated that the lockout would end on September 9, 2019, just in time for its fall performance schedule, and achieving the 12-week reduction in season by unilateral implementation.

On June 14, 2019, the Union sent an information request to the BSO asking for certain financial information related to the BSO's reaffirmed October 30 proposal and its claimed inability to pay wages for the contractual 52-week period.

On June 16, 2019, the BSO sent a letter to the Union confirming its intent to suspend musical performances on June 17, 2019 and to lockout bargaining unit employees. In this letter, the BSO urged the Union "to come to the bargaining table to discuss the issues presented by the BSO's proposal, and to try to reach agreement on the terms for a new collective bargaining agreement." On June 17, 2019, the BSO locked out bargaining unit employees without pay.

The BSO has provided a partial response to the Union's information request including audited financial statements and copies of the final draft and current version of its strategic plan. However, the BSO has yet to provide documents necessary to evaluating the financial viability of the BSO and its alleged inability to pay. For example, the BSO has yet to provide current or projected budgets for 2018-19, 2019-20, 2020-21, 2021-22, and 2022-23.

The parties have had six bargaining sessions since the June 17 lockout, on June 21, 2019, July 17, 2019, August 21, 2019, August 27, 2019, September 6, 2019 and September 9, 2019.

On September 9, 2019, the BSO ended the lockout, achieving its unilateral implementation of a 12-week reduction in its payroll schedule.

Unilateral Implementation / Lockout

An employer fails to bargain in good faith where it unilaterally implements terms and conditions of employment without first bargaining to impasse or agreement. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The party asserting impasse bears the burden of establishing it. *Wayneview Care Ctr.*, 664 F.3d 341, 347 (D.C. Cir. 2011). Impasse exists only "after good-faith negotiations have exhausted the prospects of concluding an agreement," and there is no realistic possibility that continuation of discussion at that time would be fruitful." *CJC Holdings*,

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Inc., 320 NLRB 1041, 1044 (1996) (quoting *Television Artists AFTRA v. NLRB*, 395 F.2d 622, 624 (D.C. Cir. 1968), enfg. *Taft Broadcasting Co.*, 163 NLRB 475 (1967)).

Under both Board and U.S. Court of Appeals case law, a lockout is unlawful where imposed to avoid a duty to bargain or to compel acceptance of an unlawful bargaining position. See e.g. *Kellogg Company*, 362 NLRB 736 (2015); *Anderson Enterprises*, 329 NLRB 760, 765 (1999); *Teamsters Local Union No. 649 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991), *D.C. Liquor Wholesalers*, 292 NLRB 1234, 1237 (1989). For a “bargaining” lockout to be permissible, the lockout must be solely for the “purpose of bringing economic pressure to bear in support of [the employer’s] legitimate bargaining position.” *Teamsters Local Union No. 649*, 924 F.2d at 1085 (quoting *American Ship Bldg.*, 380 U.S. 300, 318 (1965)). Since unilateral implementation of a final offer prior to impasse constitutes an unfair labor practice, it “does not qualify as a ‘legitimate bargaining position’ that [an employer] may pursue through the use of a lockout.” *Teamsters Local Union No. 649*, 924 F.2d at 1085. See also *Anderson Enterprise*, 329 NLRB at 777 (lockout unlawful where purpose was to coerce union into accepting its unilateral implementation of final offer); *United Chrome Products, Inc.*, 288 NLRB 1176, 1176 n.2 (1988) (violation where lockout used as a device to unlawfully implement change in seniority rights); *Union Terminal Warehouse, Inc.*, 286 NLRB 851, 861 (1987) (violation where lockout used to support implementation of unilateral change in shift times).

Here, the BSO has used a lockout to effectuate unilateral implementation of changes to the employee payroll period and wages. By locking out employees from June 17 until the beginning of the fall season, the BSO has achieved its desired 12-week reduction of the payroll period and a corresponding reduction in employee wages without bargaining to impasse. As detailed in the timeline above, the parties are far from reaching the point of impasse. Given the prolonged attempt to seek funding from the legislature, the parties have had limited opportunities to discuss the BSO’s proposal regarding a payroll period reduction. The BSO has at no point declared impasse and has instead, as evidenced in its June 16 letter, encouraged the Union to continue bargaining. The parties have held six bargaining sessions since the lockout commenced. At these sessions, the Union has remained opening to discussing the BSO’s proposal and to finding alternative avenues to reach an acceptable agreement regarding wages. There is no evidence that the parties are at the end of their rope or that there is no possibility for continued fruitful discussion. See *Stein Indus., Inc.*, 365 NLRB No. 31, 20 (Feb. 10, 2017) (quoting *Cotter & Co.*, 331 NLRB 787, 787 (2000); *PRC Recording Co.*, 280 NLRB 615, 635 (1986)) (“The Board will find that an impasse existed at a given time only if there is ‘no realistic possibility that continuation of discussion at the time would have been fruitful, and only if both parties believe that they are at the end of their rope.’”). Moreover, as described in more detail below, the Union is still awaiting receipt of critical information from the BSO regarding its financial situation and ability to pay bargaining unit wages. The BSO’s failure or refusal to provide this critical information further negates any finding of impasse and taints the BSO’s lockout. *National Extrusion & Mfg.*, 357 NLRB 127, 130 (2011).

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As the parties have not reached impasse, the BSO's attempt to unilaterally implement its payroll period proposal is unlawful and a lockout targeted to facilitate such implementation is equally prohibited.

Failure to Provide Requested Information

An employer's failure to provide information relevant and necessary to the performance of the union's duties as a collective bargaining representative is a violation of Section 8(a)(5). It is well established that if an employer claims an inability to pay in response to a union's bargaining demands, the union is entitled to financial information from the employer to substantiate that claim. *See N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). Here, the Union has requested financial documents necessary to understand verify and evaluate the BSO's recently reaffirmed October 30, 2018 proposal, which involves substantial reductions in employee wages and benefits based on the BSO's alleged lack of funding. To date, the BSO has failed to provide critical documents central to the Union's request such as copies of each individual musician contract, copies of documents related to the BSO's cancellation of its summer season, current and projected budgets, details regarding the structure and governance of certain restricted and unrestricted assets, and projected savings/impact on bargaining members of proposed changes to the collective bargaining agreement. The BSO's failure and refusal to provide this necessary information hinders the Union's ability to bargain effectively and constitutes a violation of Section 8(a)(5).

Conclusion

In sum, the Union requests that the Board issue a complaint that the BSO has failed to bargain with Local 40-543, AFM through its unilateral implementation/lockout and failure to provide information.

Respectfully submitted,

/s/ Bruce H. Simon

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