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THE PRESIDENT'S MESSAGE

Bankruptcy as an Employer Escape Hatch

by Ray Hair, AFM International President



No sooner had we settled the six-month orchestra strike in Detroit at the beginning of April, than we

were hit with the Chapter 11 bankruptcy reorganization filing by The Philadelphia Orchestra. The company filed its petition in US Bankruptcy Court in the Eastern District of Pennsylvania April 16.

The Philadelphia Orchestra is famed for its 1940 soundtrack to Walt Disney's *Fantasia* and for its 1965 recording of Handel's *Messiah* with the Mormon Tabernacle Choir, conducted by Eugene Ormandy that reached number three on the national charts. It is the first major US orchestra to seek bankruptcy protection.

In a public letter, company president Alison Vulgamore said, "We have a strategic plan that will move the orchestra forward with vision and purpose."

The Philadelphia filing came on the heels of a Chapter 7 bankruptcy liquidation petition filed by the Syracuse Symphony Orchestra April 5, after the SSO Board of Trustees voted to dissolve the corporation and sell its remaining assets.

Syracuse Orchestra Executive Director Paul Brooks issued a press statement saying, "In plain terms, the SSO as we now know it will cease to exist." The action prompted an investigation by New York State Attorney General Eric Schneiderman, after receiving complaints that management was refusing to refund money for thousands of tickets that had been sold for concerts that would never be performed.

The two recent bankruptcy filings, when viewed together with the Chapter 11 petition by the Louisville Orchestra late last year, the Honolulu Symphony Orchestra Chapter 7 filing from late 2009, and with the news I received today concerning the bankruptcy threat made by the New Mexico Symphony Orchestra, may indeed signal an ominous trend.

We may be seeing a concerted strategy, new to musicians but quite familiar in

heavier industry, to use bankruptcy as an escape hatch from unwanted labor agreements.

The escape hatch option dates from a 1984 Supreme Court ruling that enabled corporations to use bankruptcy as a way to cancel a union contract, cut wages, shed pension, and health benefit obligations and lay off workers without having to prove that the contract would cause the company to go broke. The AFL-CIO declared at the time, "The ruling obviously enhances the opportunity for union-busting."

Federal bankruptcy law, designed in part to buy time for financially troubled companies to rearrange their affairs, has always permitted routine cancellation of business agreements to purchase pencils, paper clips, copiers, toilet paper, floor wax, and the like.

Traditionally, lower courts have afforded labor contracts various degrees of deference. But in the 1984 high court decision, the Justices made it clear that such protection is limited. The goal of Chapter 11, wrote Justice William H. Rehnquist, is to permit a company's "successful rehabilitation."

Consequently, the US Congress in 1984 amended the bankruptcy code to exempt labor agreements from the general rule that burdensome contracts can be unceremoniously dumped. Thereafter, businesses were required to show the court that "reasonable" attempts had been made to bargain with the union for deferred or smaller wage increases or other money saving measures. Only then could they be altogether freed by the court from labor obligations.

Congressional amendments also provided that **a company may petition to seek interim changes to its union contracts—even to the extreme of a temporary contract suspension—the moment it files for bankruptcy**, rather than waiting for a court to rule on its reorganization plan. This is exactly the road that the Louisville Orchestra management took. But the outcome in Louisville gives us hope, because the Louisville management played the dangerous game of union-busting and lost.

You see Ms. Vulgamore, in the bankruptcy

courts, you can't always get what you want. In Louisville, the court denied the company's request to suspend the musicians' contract because management had failed to satisfy its burden of proof that continuing the agreement would cause the company irreparable harm, or that the company's survival depended on eliminating the collective bargaining agreement.

If the agreement were suspended (along with its no strike, no lockout provisions) and Louisville Orchestra concerts were cancelled, the judge noted, that would create more creditors—namely the concertgoers who had already paid for concerts, as well as pricey guest artists scheduled to perform. The Board might lose its grant funding, and significant damage would also be done to the orchestra's goodwill in the community, he said.

Management had also not proven that it couldn't tap into other sources of funding, such as the nearly \$10 million held in endowment funds, which the judge saw as effectively controlled by the company.

The defeat of the attack upon the Louisville Orchestra contract confirms the advice I've received from some very good creditor bankruptcy attorneys—there is a high bar to clear when an employer asks the court to throw out a union contract.

And Ms. Vulgamore, how will you explain away to the Philadelphia bankruptcy court the matter of \$140 million in endowment funds? What will your orchestra think about payments of \$319,306.63 to your lawyers for your bankruptcy work thus far? They were busy beavers weren't they—putting that big courtroom drama together, while you were making "reasonable" attempts to bargain concessions from the union.

We are watching the latest installment in the dangerous game of union busting. So are the orchestra managers in New Mexico, Syracuse, and others that are waiting to see if the Philly strategy can catch fire. But smoke can blow two ways—the fire may ultimately consume that expensive bankruptcy petition, setting ablaze that vaunted strategic plan—that low road to the employers' escape hatch.