

American Federation of Musicians & Atlanta Federation of Musicians, Local Union 148-462 (Atlanta Symphony Orchestra) and Daniel O. Laufer. Case 10-CB-7335

April 24, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND HURTGEN

On May 16, 2000, Administrative Law Judge Jane Vandeventer issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Charging Party filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.²

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Lauren Rich, for the General Counsel.

Lesley A. Troope and *James D. Fagan Jr., Esqs. (Stanford, Fagan & Giolito)*, for the Respondent.

Robert Thompson Jr. and *Gordon J. Rose, Esqs. (Thompson & Associates)*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. This case was tried on January 5, 6, 7, 24, 25, and 31, 2000, in Atlanta, Georgia. The complaint alleges Respondent violated Section 8(b)(1)(A) of the Act by failing and refusing fairly to represent Daniel O. Laufer (Laufer or the Charging Party) by refusing to process his several grievances. The Respondent filed an answer denying the essential allegations in the complaint. At trial, I granted counsel for the General Counsel's motion to amend the complaint to plead a special remedy. After the trial, the parties filed briefs which I have considered.¹

¹ We disavow the judge's statement that the Board applies a different standard for determining whether a union breaches its duty of fair representation depending on what stage the grievance is in.

² The Charging Party has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

¹ Counsel for the Charging Party, on April 12, 2000, filed a late motion to supplement the record with a corrected and modified brief. Rule 102.42 of the Board's Rules and Regulations makes no provision for additional briefs. I deny counsel for the Charging Party's motion and reject its late-filed brief.

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Atlanta Symphony Orchestra, a division of the Robert W. Woodruff Arts Center, Inc. (the ASO), is a Georgia corporation with an office and place of business in Atlanta, Georgia, where it operates as a professional symphony orchestra. During a representative 1-year period, the ASO derived gross annual revenues in excess of \$1 million in operating revenues. During the same period, the ASO sold and shipped from its Atlanta, Georgia facility goods valued in excess of \$5000 directly to points outside the State of Georgia. Accordingly, I find, as Respondent admits, the ASO is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent (Respondent or the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

a. *The orchestra and "seating" in the orchestra*

The ASO is a major symphony orchestra which not only performs a full season of concerts in its Atlanta venue, the Woodruff Arts Center, but also performs concerts in other parts of Georgia, the United States, and outside the country. In addition, the ASO records music for sale and distribution by a large recording company. At the present time, there are approximately 95 players in the orchestra.

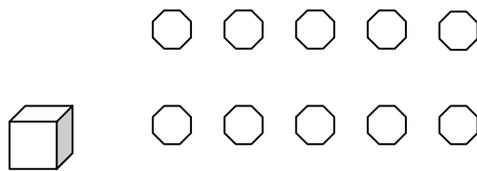
The symphony players are seated in sections, according to their instruments. The placement of the sections, as well as the placement of individual players within the sections, is usually decided upon in accordance with long tradition. Under the traditional pattern, the string instruments are seated nearest the audience, with the first violins to the conductor's (and the audience's) left, and the cello section to the conductor's right.

The seating of players within each section is largely governed by tradition as well. In most of the sections, there are leading players called "principal" players. In the cello section of the ASO during the entire period herein, the principal cello player was Christopher Rex. The principal cellist, for example, sits at the right hand of the conductor, and the principal first violin, normally called the concertmaster, sits at the left hand of the conductor. The cellists sit in ranks of two, each two cellists sharing a music stand. If there are, for example, 10 cellists in an orchestra, there will be five rows or "stands" of 2 cellists each, sitting behind one another, all facing the conductor.

The duties of the principal player are to mark the bowings on the music for the entire cello section, to play solos, and to lead the section who, sitting behind him, can follow his movements and playing. In some sections, there are additional "titled" players, namely "associate principal" and/or "assistant principal," ranked in that order. For many years, until 1991, the ASO had an assistant principal cellist, but did not have an associate prin-

principal cellist. From 1982 to the present time, the assistant principal cellist of the ASO has been Dona Klein. The duties of an associate principal (or if there is no associate principal, then of the assistant principal) player in the cello section are to play any secondary solos, to lead the cellists seated behind him or her, and to substitute for the principal player during any absence. The remaining players in the section, those without specific titles, are referred to as "section players" or "tutti" players.

In addition to the duties outlined above, there is a certain amount of prestige attached to being a principal or other titled player. Continued advancement within the profession of symphony musician could be enhanced for a musician who is a titled player rather than simply a tutti player.



AUDIENCE

In the diagram above, the box represents the conductor's podium, and the shapes represent the cello section. The player on the lower left of the group is the principal player, and his seat is designated as the first chair. The seat beside him (upper left) is designated as the second chair. Together, the first and second chairs are called the first stand. The shape immediately to the right of the first chair is designated as the third chair, also referred to as "second stand, outside." The remaining seats are numbered consecutively to the rear of the section.

Music Director Yoel Levi came to the ASO in 1988 and continued as music director throughout the events of this case. As Music Director, he is also the principal conductor of the ASO. Levi testified that while the seating arrangement described above is the traditional and most common practice among orchestras with which he is familiar, it is not an invariable practice, and there are orchestras which change the traditional seating pattern for their own reasons.

After a few years at the ASO, pursuant to his goal of improving the ASO, Levi decided to create the position of associate principal cellist beginning in the 1991–1992 concert season. The position was advertised in the fall of 1990, and auditions were held in February 1991.

b. The collective-bargaining agreement and individual contracts

Respondent has represented the musicians of the ASO for many years, since at least 1962. The ASO negotiates not only a collective-bargaining agreement with Respondent, but also individual employment contracts with the musicians on an annual basis. The collective-bargaining agreements for many years

have included a provision stating that all individual contracts are incorporated into the collective-bargaining agreement. Despite the fact they are "a part of" the collective-bargaining agreement, the individual contracts are given only to the individual musicians, and it is entirely up to the individual musician whether to file a copy of his or her individual contract with Respondent. If an individual contract is filed with Respondent, the collective-bargaining agreement requires Respondent to hold its contents "in the strictest confidence."

Typically, an individual employment contract specifies a player's salary, a player's title, if any, and the player's seat within his or her section. The contract may also specify additional vacation weeks or some other arrangement whereby a player may be permitted time to perform with other orchestras or ensembles.

While Respondent is the collective-bargaining representative of the musicians in the ASO, a committee of musicians participates in the negotiations and administration of the contract. This committee is called the Atlanta Symphony Orchestra Players Association, or ASOPA Committee.

One other aspect of the collective-bargaining agreement deserves mention at this juncture. Through August 1996, the collective-bargaining agreement contained a specific procedure for reseating of principal players and the non-renewal of any player's contract. This procedure was to be invoked "for reasons of insufficient musical competency," and required notice, written reasons, a discussion, a chance to demonstrate improvement, and an appeal process, culminating in arbitration. Beginning with the current collective-bargaining agreement, covering the period December 1996 through August 2000, a less complex procedure for the reseating of all other musicians (non-principal players) was negotiated. That provision is germane to this case and is set forth here:

Seating in the Orchestra will be at the discretion of the Music Director. Each musician shall, however, be notified in his/her individual contract as to which seat he/she will occupy for the following contract year. Prior to recommending a reseating of a Tenured non-Principal Musician, the Music Director will consult with the Review Committee, consisting of the Principal and two members of the section involved. The two members of the section involved will be chosen by the ASOPA Committee. Following this consultation, the Music Director will meet with the Musician involved. The said meeting will take place on or before October 1st of the season preceding the season in which the reseating would take effect. The Music Director will explain the reasons for the proposed reseating. The Musician will be given a period of approximately four months in which to demonstrate corrective performance. A second meeting will be held approximately four months following the first to communicate the final results of the Music Director's decision. The Music Director may make changes on an emergency basis due to illness or absence.

There was a strike among the ASO players during the fall of 1996, which ended when the current collective-bargaining agreement was agreed upon. During that period, in 1996–1997, Laufer was secretary of the ASOPA Committee. Laufer has been a member of Respondent for his entire tenure at the ASO.

c. Laufer's career

Laufer, the son of cellist Wolfgang Laufer, began the study of the cello as a child, and at the age of 18, began his own professional career as a cellist with the Dallas Symphony Orchestra, where he played for two seasons. At the time of his audition with the ASO in February 1991, he was 21 years old. In the highly competitive world of symphony musicians, auditions are conducted anonymously; that is, the player is seated behind a screen or curtain. According to principal cellist, Rex, the audition committee (which included Music Director Levi) was unanimous in selecting Laufer as associate principal cellist in February 1991.

Laufer and Levi were the only two witnesses who specifically recalled being present when Laufer was offered the position.² Levi offered him the position, but at the same time stated that he would be seated at the second stand, outside chair. Levi remarked that he hoped Laufer didn't mind, but that he couldn't be seated at the first stand because there was a "problem with the Assistant Principal cellist," but that it "will be resolved." Laufer recalls that Levi did not say *when* the seating situation would be resolved. The written individual contract (for the 1991–1992 season) proffered to Laufer and ultimately signed by him provided that his "position and/or title" was "Associate Principal (Outside 2nd Stand)." Laufer told the ASO's personnel manager that he was agreeing to the seating arrangement as proposed only until the problem was resolved. His annual individual contracts continued to include essentially the same language concerning his position and seat through the 1998–1999 season. At the time of this trial, during the 1999–2000 season, Laufer was playing without a contract.

As time went by, Laufer began to regard Levi's comments—to the effect the seating issue would "be resolved"—in the nature of a promise by Levi to reseat him in the second chair. He also began to wonder just *when* this undertaking would be fulfilled.

It is undisputed in this record that Laufer was and is the better cello player as between himself and Assistant Principal Klein. Both Music Director Levi and Principal cellist Rex testified without equivocation this is so, and described Laufer as "talented . . . the better player" and "the stronger player," respectively.

d. The ASO's handling of the seating issue

Unbeknownst to Laufer, in the summer of 1990, the assistant principal cellist, Dona Klein, had filed a grievance regarding the announcement of the creation of the associate principal cellist position. It is undisputed that the position of associate principal outranks that of assistant principal. Klein was apparently unhappy that her longtime status of being second only to the principal cellist was about to change, and was apparently not satisfied with Levi's suggestion that she audition for the associate

position. It appears from the evidence available concerning this 1990 grievance that then-president of Respondent, Nick Pennington, supported Klein in her grievance as well as in her right to file a grievance as an individual under the collective-bargaining agreement. This latter point may be unimportant as to Klein's grievance, since Pennington apparently authorized Klein to state that Respondent joined in Klein's grievance. Pennington also wrote to the ASO in November 1990 stating Respondent's intention to pursue Klein's grievance through arbitration, if necessary. Pennington apparently also essentially delegated settlement of the grievance to Klein and her husband, Dan, who is an attorney.

Nearly 6 months after Klein's grievance was filed, and shortly before Laufer's audition in February 1991, the Kleins negotiated a settlement of the grievance with the ASO. The settlement provided that Klein would retain her second chair ("inside stand, first row, next to principal cellist" in the settlement). Respondent did not sign the settlement document, and there is no evidence in this record as to whether Respondent concurred in the settlement or even received a copy of it. Since the settlement was conditional upon Respondent withdrawing the grievance, however, it may be inferred that Respondent did indeed withdraw the grievance. Klein did not audition for the associate principal position when the audition was held some days later.

From time to time during the first few years of his career with the ASO, Laufer had inquired of Music Director Levi and other management officials as to the status of his accession to the second chair. Laufer recalled that on one of these occasions, Levi counseled him to "be patient." During this period, assistant principal cellist, Klein, often played *divisi* solos by virtue of her seat next to the principal cellist, which Laufer regarded as one of the perquisites of his position as associate principal. However, on at least one occasion, Levi assigned Laufer to play one of the solos despite the fact that he was not sharing a music stand with the principal cellist.

In connection with the negotiation of his 1995–1996 individual contract, Laufer wrote to the ASO's president raising the issue of his seating. In his letter of March 20, 1995, Laufer appears to be offering to "settle" the issue of his sitting in the third chair in exchange for consideration in the form of salary and vacation time. While he did meet with President Allison Vulgamore about this offer, and did ultimately sign an individual contract for the succeeding season, it is unclear whether this agreement "settled" the issue of Laufer's seating, and if so, whether for that one season or for any longer period. The contract contains no express language which applies to anything other than the 1995–1996 season. Accordingly, I find any "settlement" of the issue of Laufer's sitting in the third chair was limited to the 1995–1996 season, the duration of the contract in question.

At about the same time, Music Director Levi met with Dona Klein in an effort to move her seat to the third chair. Dan Klein promptly wrote a letter protesting this effort, contending under the collective-bargaining agreement and her individual contract, Dona should retain her seat unless the ASO showed she lacked "sufficient musical competency" to continue in her titled position. Dan Klein also brought the matter to the attention of Respondent, and on April 29, 1995, the ASOPA Committee issued

² Laufer was a conscientious and careful witness who is credited throughout. Where his testimony conflicts with that of other witnesses, Laufer is credited. Levi, although an honest witness, and worthy of credit on general factual matters and particularly the "industry practice" of orchestra, did not possess a detailed recollection of many of the events about which Laufer and he both testified. Again, Laufer is credited based on his clearer recollection. While Laufer recalled that Rex was also present, Rex had no recollection of the meeting at all.

a memorandum to musicians who were “Non-principal Titled Players” alerting them to the controversy. Before the matter went any further, Dona Klein began a medical leave because of a hand problem, and was out of the orchestra for the entire 1995–1996 season and some months of the following season. During the period of Klein’s absence, Laufer sat in the second chair.

Laufer received a copy of the April 29, 1995, memorandum, and testified that, while he had previously heard rumors concerning Dona Klein’s agreement about her seating, the April 29 memorandum was the first confirmation he had that such a deal existed and was apparently in writing.

As stated earlier, at the beginning of the 1996–1997 season, the musicians went on strike against the ASO. The strike was finally resolved and the season was begun in December 1996. Beginning in December 1996, the new reseating procedure quoted above went into effect. Dona Klein returned to the orchestra in early 1997 and resumed her second chair in the cello section. At some point following her return, Principal cellist Rex was absent from the orchestra on medical leave for a number of months, and Laufer assumed his duties and his chair during his absence. Except for this period, he continued to occupy the third chair for the remainder of the 1996–1997 season, the 1997–1998 season, and the 1998–1999 season. Throughout these seasons, as noted above, Laufer’s individual contract specified his seating in this chair. On at least one occasion during the 1997–1998 season, Laufer spoke to Music Director Levi once again about his seating, but Levi told Laufer he could not do anything about it because the ASO management was afraid of a lawsuit on behalf of Dona Klein.

2. Facts concerning the instant charge

a. The January 1999 grievance

It was in this last season, in November 1998, during “Mahler week,” that Laufer became impatient once again with the seating arrangement. During both the concerts and the recording session of Mahler week, he would not be playing two solos in Mahler’s Seventh Symphony which he felt “belonged” to the associate principal player. He approached the general manager, George Alexsovich, as well as Music Director Levi, about the matter, but was not assigned to play the solos.

During that week, Laufer for the first time contacted Respondent in order to seek help with his problem. He called John Head, Respondent’s president, and explained his dilemma. Head had previously played in the ASO, and was aware of the normal duties of an associate principal. According to Laufer’s testimony, Head was sympathetic with Laufer’s plight, and said he blamed Levi for it. Laufer asked Head if he could protest by refusing to go to work. Head told him the ASO could fire him if he stayed out of work for 3 days. Head advised him to call Respondent’s attorney, Robert Giolito, for his opinion. During one of their two telephone conversations in November, Laufer testified, Head told Laufer he believed Laufer could file a grievance as an individual under the collective-bargaining agreement. Laufer also asked Head if he could secure independent counsel and if Respondent would pay the cost. Head told Laufer he could contact Giolito and Respondent would pay Giolito for time he spent talking with Laufer or researching the issue. Head testified his initial reaction was that Laufer’s problem was a “musi-

cal matter,” not a contractual one, since seating in the orchestra is “at the discretion of the Music Director” according to the collective-bargaining agreement.

When Laufer spoke to Giolito during the same week, he explained the usual duties of an associate principal to the lawyer, described what was stated in his individual contract, and mentioned the fact other players titled associate sat next to the principal players and played *divisi* solos, but he did not. According to Laufer,³ Giolito told him that unless his responsibilities were spelled out in his contract, he had “no hope” of showing he should be performing these duties, despite what other titled players and other orchestras might do.

Not content with the opinions he got from Respondent, Laufer secured attorneys, Robert Thompson and Gordon Rose, to assist him with his problem. Together they drafted a letter setting forth Laufer’s grievance, and forwarded it to Respondent’s Head on about January 13, 1997. Head, in turn, forwarded the draft grievance to Giolito and asked him for his opinion.

The draft grievance (later submitted to the ASO by Laufer) has two main “theories,” one that “industry practice” requires the Associate to be seated second chair, and the second essentially requiring the music director to exercise his discretion described in the collective-bargaining agreement to reseat Laufer in the second chair regardless of what Laufer’s and/or Klein’s individual contracts might say.

A meeting took place in Giolito’s office on January 14, 1999.⁴ According to Head, his purpose in meeting with Laufer was to find out the basis for the grievance and to see if Respondent could concur in it. Present were Laufer, his attorney Gordon Rose, Head and Giolito.⁵ The draft grievance was discussed, and Laufer related his history with the ASO. Laufer also provided copies of his individual contracts. Laufer related what had happened when he was offered the job, that he had been told there was a problem with the second chair, and asked if he would sit in the third chair “until it was resolved.” Giolito inquired who had told him that, but Laufer did not name Levi. Either Giolito or Head asked Laufer if he had this statement in writing, preferably a writing from 1991. Laufer said he did not. Giolito said without a writing as evidence of management’s intention, Laufer’s claim was not compelling.

During the course of the meeting, Giolito asked Laufer why he had originally signed his individual contracts with the third chair specified. Laufer answered he had had no choice. At

³ Where Laufer’s testimony differs from that of Giolito, Laufer is credited for the reasons stated above. In addition, Giolito was not an impressive witness. He often answered in a hasty manner, and did not appear to be careful or to be trying to recall events with accuracy. His memory of some of the events was negligible, and he appeared overall to be more interested in expressing legal opinions and theories than in an unvarnished recital of the facts.

⁴ All dates hereafter are in 1999, unless otherwise specified.

⁵ Laufer and Head are credited with respect to what took place at this meeting. Giolito is not credited for the reasons stated above. Rose is likewise not credited. In addition to displaying a poor memory, he, like Giolito, was eager to offer legal opinions and theories in lieu of facts. His advocacy and strong belief in his client’s interests appear to have colored his recollection of the facts. While Rose is not credited as to Giolito’s manner at the meeting being “hostile,” it was conceded by all parties that Giolito is talkative and has a quick and eager demeanor.

some point in the discussion, Giolito asked Laufer if he would settle his claim against the ASO for money, and Laufer declined, saying it was not about money. At another point, Laufer mentioned that Dona Klein appears to have some kind of agreement entitling her to the second chair. Giolito responded Respondent could not discuss individual contracts, since they are confidential. There was also some discussion of the fact that Laufer's potential grievance would "pit one member against another."

The two lawyers discussed whether Laufer could file an individual grievance under the collective-bargaining agreement, regardless of whether Respondent joined in the grievance. During this meeting, Giolito was equivocal in his opinion on the question. According to Head, he and Giolito asked several times what precise provision of the collective-bargaining agreement was violated, especially since the duties of the associate principal are not set forth there. Giolito also stated the music director should initiate the reseating process, as he is the one with the power to do so. After about an hour of questions and discussion, Giolito gave his opinion to the effect that he did not think Laufer could make out a violation of the collective-bargaining agreement, or could prove he should be seated in the second chair when his contract specified the third chair.

Head sent Laufer a letter dated January 15 stating he would recommend to Respondent's executive board (which has the power to approve the pursuit of grievances) that it not file or pursue Laufer's grievance. Head gave as reasons, "Based on the information you supplied, I do not see that a violation of the Agreement has taken place," and "I do not feel that it is in the best interest of the union to enter into a process that would ultimately be unsuccessful."

Laufer and his attorneys submitted the grievance to the ASO on January 15, and by letter of January 30, General Manager Alexsovich denied the grievance on the grounds: (1) Laufer could not file an individual grievance and (2) he had not "set forth a matter that is grievable under the Collective Bargaining Agreement."

Following the meeting on January 14, Laufer sought to obtain evidence of Levi's previously expressed sentiments in favor of seating him in the second chair. He had been impressed by the importance attached to documentary evidence by Giolito. Laufer apparently reasoned that if he did not have any contemporaneous (i.e., 1991) expression of the music director's desire that he should be seated second chair, evidence of the music director's desire at the present time would be the next best thing. On January 16, he met with General Manager Alexsovich, Music Director Levi, and Personnel Manager Russell Williamson, in which meeting Levi stated it was his desire, and always had been his desire, to have Laufer sit in the second chair. Levi gave artistic and musical reasons for this desire. Alexsovich stated he felt the same, but was bound by the agreement the ASO had made with Klein in 1991.

Laufer took notes of what was said at this meeting, as did Personnel Manager Williamson, and copies of these notes were sent to Respondent's Head on February 9. After consulting with Giolito, Head responded by letter on February 17 to the effect that he had reviewed the notes submitted by Laufer, but they did not change his viewpoint on the grievance. Head also talked with Laufer on the telephone on February 22 and told him,

among other things, that in his opinion, Laufer's situation was the result of errors and weakness on the part of management. He said Levi should have exercised his responsibility long ago and taken care of the matter. Head was sympathetic to Laufer's dilemma, but again stated Respondent was in a difficult position when the controversy would pit two members against one another. According to Laufer, Head suggested it would be beneficial to have a letter from Music Director Levi to the effect that he desired Laufer to be seated second chair, but his hands were tied by other components of management. Further, according to Laufer, Head said Laufer had a good case and "management will have to deal with it."

The following month, Laufer obtained a letter from Music Director Levi. The text of the March 26 letter is as follows:

In response to your letter of March 21, 1999, I would like once again, as the Music Director of the Atlanta Symphony Orchestra, to express my desire regarding the title Associate Principal Cello: as I stated very clearly in our meeting of January 16, 1999, with you, George Alexsovich, and Russell Williamson, my wishes are that this position should occupy the inside chair, first stand. It was my intent when I hired you, as Associate Principal Cello, for you to have the same chair, as it is in the case of Associate Concertmaster position.

The record shows that, a few years ago, I started a process of implementing my above wish, and unfortunately [sic], the process was put on hold. I hope that we are able to restart the process, and bring it to a successful conclusion.

Laufer wrote to Respondent's Head on April 5, enclosing a copy of Levi's letter quoted above, and again stating that in view of Levi's wishes, he believed management was violating the collective-bargaining agreement. By letter dated April 7, Giolito reiterated Respondent's position it would not proceed with Laufer's grievance, stating, "[A]fter a full investigation of the matter, which included a meeting with Mr. Laufer and his counsel, a thorough review of all of the correspondence and documents which Mr. Laufer submitted to the Union, and consultation with its counsel, the Union determined that Mr. Laufer's grievance is without merit." Giolito went on to deny Head had promised to proceed with the grievance should Levi memorialize his desire to reseat Laufer in the second chair.

b. Conduct of the ASO

At the same time as he was attempting to enlist Respondent to aid him, Laufer was also negotiating his individual contract for the 1999-2000 season with the ASO. In the course of these negotiations, he presented Levi's March 26 letter, to the consternation of President Vulgamore and other members of the ASO management team. After several meetings and exchanges of letters, it was agreed Laufer would perform during the 1999-2000 season, but no individual contract was signed by him, as Laufer would not sign a contract which did not specify he would occupy the second chair. In June, General Manager Alexsovich informed him the second chair was "not available."

Laufer continued to have conversations with Levi during the summer about the reseating procedure, and Levi continued to assure Laufer he intended to give notice to Klein by October 1,

as required by the contract, of his intention to reseat her in the third chair. According to Rex, General Manager Alexsovich had informed him in August of Levi's desire to change Klein's seat. Alexsovich told Rex that since the master collective-bargaining agreement had changed, Klein's "rider" concerning her seat was no longer in force. Rex told Alexsovich that Klein is playing no differently, and is "adequate." Rex said he saw the reseating of Klein as a demotion. He stated Levi would be gone by the time the reseating took effect in the fall of 2000, and since it is an artistic decision, the new music director who would replace Levi in the 2000-2001 season should make the decision. He pointed out if Levi made this decision so late in his tenure, it would be perceived as favoritism, or "pay-back," and not as an artistic decision. During September, Levi consulted with Principal cellist Rex about the matter, in conformance to the collective-bargaining agreement. Rex made the same points to Levi as he had to Alexsovich, and added the likelihood of a lawsuit by the Kleins might necessitate Levi's return to Atlanta to testify after he had left the city.

Apparently Rex was persuasive, and after 6 months of fully intending to do so, Levi decided not to initiate the reseating process with respect to Klein. In testimony, Levi described it as a painful, unhappy decision. He testified his reasons for making this decision were:

1. it was his last year, and he felt that drastic changes should not be made so late, that it might seem vindictive or personal on his part;
2. the Principal cellist advised against reseating Klein in Levi's last year as Music Director;
3. the orchestra members would not support the decision to reseat Klein;
4. he knew it would be challenged, would be a big mess, a public relations nightmare, and a no-win situation; and
5. he didn't want to have to return to Atlanta to testify in any litigation concerning it.

Levi informed Laufer of his change of heart about a week before the October 1 deadline for initiating the reseating procedure.

c. Laufer's October 1 grievance

Laufer filed a second grievance protesting the October 1 failure of the ASO to initiate the reseating process, seeking to be seated in the second chair, and reiterating the theories contained in his first grievance, but adding an additional theory, that of "fraudulent inducement," based on the theory the purported promise to him in 1991 to move his seat to the second chair at some point in time was the inducement to enter into a contract with the ASO in the first place.

On September 27, the complaint and notice of hearing in the instant case issued.

Sometime in August, Respondent secured from Dan Klein a copy of the 1991 settlement agreement regarding Dona Klein's grievance. Respondent's Head testified that when he took over as President in 1993, succeeding Nick Pennington, Respondent's files were in an embarrassing state of chaos. Head did not know whether Respondent had possessed a copy of the settlement in 1991 or at any time prior to August. In September, Laufer and

his attorneys were provided with a copy of the Klein settlement agreement by the regional office investigating Laufer's charge.

Giolito testified Respondent determined to investigate Laufer's October 1 grievance anew, since it concerned a new incident, and contained a new claim, that of fraudulent inducement to enter into a contract. Giolito met with Laufer and his attorneys during October, and exchanged documents and letters for about 2 months. Respondent also interviewed Principal cellist Rex about the history of the seating issue as well as his September discussions with various members of management about it. Respondent requested of the ASO to examine the personnel files of Laufer and Klein. Finally, on December 29, Respondent decided not to pursue Laufer's October 1 grievance, and informed him of its decision by letter of that date. Respondent informed Laufer that it considered his grievance to be time barred, but did address the merits, stating:

The Union does not interpret Klein's settlement agreement as usurping the discretion afforded the Music Director under Art. X.I.e of the master agreement to make seating assignments as provided therein. Moreover, ASO management recently informed the Union that the Music Director had decided not to make any change in the seating at issue. Accordingly, we do not believe there exists any contractual basis on which to challenge management's decision.

We understand that you feel deeply wronged. Regrettably, the Union simply cannot seek to arbitrate what we sincerely believe to be a non-meritorious grievance.

C. Positions of the Parties

1. The General Counsel

The General Counsel relies upon the "pattern of conduct" cases, which hold that a union may violate its duty of fair representation by conduct which is so unreasonable, perfunctory, and/or irrational, as to amount to arbitrary conduct. In support of this theory, the General Counsel argues Respondent violated the duty of fair representation because it intentionally misled the Charging Party about its intentions with respect to handling his grievance, it intentionally withheld information from the Charging Party, its investigation was inadequate and perfunctory, it decided too hastily that his grievance lacked merit, and thereafter refused to evaluate additional evidence with an open mind.⁶

2. The Charging Party

The Charging Party's argument tracks that of the General Counsel, but adds a contention that Respondent did in fact discriminate for invidious reasons by essentially deciding to support one member's right to the second chair (Klein's) over another member's right to the same chair (Laufer's). The Charging Party also differs from the General Counsel with respect to the remedy sought. In addition to the remedy sought by the General Counsel, that of ordering Respondent to process Laufer's grievance

⁶ The General Counsel's theory of the case does not allege that Respondent violated its duty of fair representation by refusing to process and arbitrate Laufer's grievance because of discriminatory reasons, such as nonmembership in Respondent, internal political opposition, race or sex discrimination, or other such invidious forms of discrimination.

ance through arbitration, the Charging Party seeks reimbursement of legal fees incurred in retaining his own counsel for the purpose of pursuing his grievance.

3. Respondent

Respondent argues it has not violated the duty of fair representation implied in Section 8(b)(1)(A), because it made a good faith decision, based on reasons grounded in the collective bargaining agreement, not to arbitrate Laufer's grievance, and while its actions and investigation may not have been perfect, they were well within the "wide range of reasonableness" granted to unions in the discharge of their representative duties. Respondent contends a union is not required to arbitrate every grievance, even if meritorious. Respondent further contends the actions pointed to by the General Counsel to show arbitrary conduct are susceptible of rational explanation. Respondent asserts there was no showing of bad faith or discrimination on its part, and further argues Laufer's grievance was clearly non-meritorious, based on various claims that it was time barred.

B. Discussion and Analysis

1. The duty of fair representation

The duty of fair representation is a judicially created doctrine which assumes that a union which has the status of exclusive representative of a group of employees owes those employees a duty to represent them fairly.⁷ While this sounds a simple and an eminently reasonable proposition, it has been the subject of countless refinements in cases decided by the Board and the Federal courts.

The duty applies to a union's conduct in the area of collective bargaining negotiations, grievance handling, including settlement and arbitration, and fiscal management, among others. See, e.g., *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65, 67 (1991); *Teamsters Local 814 (Beth Israel Medical)*, 281 NLRB 1130, 1146-1147 (1986); *Teamsters Local 101 (Allied Signal)*, 308 NLRB 140, 143 (1992); *Furniture Workers Local 76B (Office Furniture)*, 290 NLRB 51, 62-63 (1988); *Communications Workers v. Beck*, 487 U.S. 735 (1988).

The degree of rigor assigned to the duty must take into account the union's duty to represent the entire bargaining unit, as well as individuals. It has been recognized that in order to perform its representative functions effectively, a union must be allowed a "wide range of reasonableness" in its conduct and decision-making. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

With specific reference to grievance handling, in cases where a union has never undertaken to arbitrate a grievance because of its determination that the grievance lacks merit, the standard of conduct is that of a good-faith evaluation of the grievance and a rational reason for the decision. *Pacific Maritime Assn.*, 321 NLRB 822, 823 (1996); *Teamsters Local 337 (Swift-Eckrich)*, 307 NLRB 437, 438, 440 (1992).

The cases cited by the General Counsel in which a union first undertook to process a grievance, and later dropped it or decided not to arbitrate involve a somewhat different standard. In those

⁷ *Vaca v. Sipes*, 386 U.S. 171 (1967); *Miranda Fuel Co.*, 140 NLRB 181 (1962).

cases, the merits of the grievance are not the issue, assuming the grievance is more than "frivolous;" instead "the finding of a violation turns . . . on whether the union's disposition of the grievance was perfunctory or motivated by ill will or other invidious considerations." *Bottle Blowers Local 106 (Owens-Illinois)*, 240 NLRB 324 (1979).

2. Respondent's "pattern of conduct"

The General Counsel has alleged that Respondent engaged in a "pattern of conduct" which was dishonest, arbitrary, and unfair, and, taken together, amounted to a breach of the duty of fair representation. The General Counsel points to instances of alleged intentional misleading of Laufer, willful misinformation, purposeful withholding of information, favoritism, dishonesty, and cursory investigation. While the General Counsel asserts it is unnecessary under this theory to show that Laufer's grievance had merit, nevertheless, the General Counsel contends that it is meritorious. The General Counsel relies upon *Teamsters Local 814 (Beth Israel Medical)*, supra.

a. Intentional misleading

The allegation Respondent intentionally misled Laufer is based on the contention that Head's and Giolito's comments concerning the importance of a writing as evidence was correctly construed as a "promise" to take Laufer's grievance to arbitration should such a writing be found.

At the January 14 meeting, while there was certainly miscommunication, I do not find there was any intention by Respondent to mislead Laufer. After studying Laufer's individual contracts, his draft grievance, and the other documents he brought to Respondent on January 13, Head and Giolito met with Laufer and his attorney to discuss the evidence, to find out if there was any other evidence, and to ask questions relative to the issues raised in the grievance. In such a clearly investigatory meeting, it would be entirely logical for Head and Giolito to express regret that a contemporaneous writing promising to reseat Laufer at some time in the future did not exist, and even to express the opinion the grievance would be a stronger one if there were such evidence. That Laufer construed these comments to indicate he should secure such a writing, and if he did so, Respondent would then take his grievance to arbitration was not the result of any intentional misleading by Head and Giolito, but was, I am persuaded, the result of Laufer's intense desire to have Respondent's support.

Head expressed sympathy with Laufer's predicament both in November 1998 during telephone calls and during February in telephone calls. Head's comment to Laufer in February that "management would have to deal with" his grievance does not, in my opinion, constitute a clear promise to support Laufer's grievance. Consistent with Head's repeatedly placing the blame for Laufer's situation on management, I find this remark intended to place the responsibility for solving Laufer's dilemma exclusively on management's shoulders, and did not constitute a "promise" Respondent would proceed with Laufer's grievance.

In sum, I find Respondent did not, as contended by the General Counsel, act dishonestly or intentionally mislead Laufer by promising it would proceed with his grievance if he were to obtain a writing from Music Director Levi. Likewise, I find Respondent did not intentionally mislead Laufer with respect to

its position on filing an individual grievance. Respondent did not take a definite position concerning this issue at the January 14 meeting or in its January 15 letter to Laufer. This was not particularly relevant, since Laufer filed his grievance with the ASO in any case, and subsequently, the ASO took the position an individual grievance was not cognizable.

b. Willful misinformation and withholding of information

The General Counsel argues that at the January 14 meeting, the discussion of Dona Klein's contract constituted willful misinformation and/or withholding of information by Respondent. In this regard, when an assumed Klein agreement was mentioned, Giolito said he could not discuss other musicians' individual contracts, because they were confidential. Contrary to the suspicious characterization assigned to this remark by the General Counsel, I find it is entirely consistent with the collective-bargaining agreement, which states in article X, section 1.g, that Respondent is obligated to keep each individual contract confidential, if a musician opts to supply Respondent with a copy.

With respect to Klein's 1991 grievance settlement agreement, Head testified without contradiction he was unaware on January 14 whether Respondent had a copy at all, because Respondent's files had been left in such a chaotic state by the former President. Giolito credibly testified the first time he saw the 1991 Klein settlement was in August, when Dan Klein provided him with a copy. Any implication Respondent "willfully" withheld a document which it did not possess is rejected.

c. Favoritism

The Charging Party argues Respondent's choice not to pursue Laufer's grievance amounted to an arbitrary favoring of Klein over Laufer. It appears Respondent had to choose one course or the other, and if it had chosen to pursue Laufer's grievance, Klein would have an equally valid argument Respondent had arbitrarily favored Laufer. As counsel for the General Counsel cogently stated in her brief, "Two musicians in an orchestra cannot possibly sit in the same seat at the same time." Unions are frequently presented with situations, either in negotiations or in grievance handling, in which the interests of two unit members or two groups of unit members are opposed. It would beggar logic to hold that whenever a union was forced to such a choice between two competing interests, it "discriminated" against one employee or group of employees in violation of the duty of fair representation.

The Charging Party has also argued Respondent showed hostility towards Laufer. I find no basis in the record for such an assertion. Head was, by Laufer's admission, sympathetic in manner towards him and his problem. I have not credited Rose's testimony with respect to Giolito's "loud" or "hostile" manner towards Laufer and Rose during the January 14 meeting. In any case, speaking to a grievant in a loud tone and even using rude language is not in and of itself a violation of Section 8(b)(1)(A). *Teamsters Local 997 (Keebler Co.)*, 298 NLRB 604, 606 (1990).

d. Cursory investigation and hasty decision

The reading of Laufer's January 13 submission, the investigatory meeting of January 14 and subsequent perusal by Head and Giolito of documents supplied to them by Laufer is admittedly

the extent of the investigation of the grievance undertaken by Respondent. In view of the collective-bargaining agreement provision concerning reseating, and the written contract providing for Laufer's seating for the current season, I find it was not a cursory or perfunctory investigation. While Respondent certainly could have attempted to track down a copy of Klein's 1991 settlement in January, and did not do so, it is clear from Giolito's remarks at the January 14 meeting that he assumed Klein's individual contract for the current season included her second chair seating, just as Laufer's contract included his third chair seating. Both Head and Giolito were well aware musicians' individual contracts customarily included their seating. I find neither Respondent's failure to seek the 1991 agreement in January nor any other omission renders its investigation "cursory." I find the investigation Respondent did pursue enabled it to form a nondiscriminatory opinion concerning the grievance issues and potential for success. *Slevira v. Western Sugar Co.*, 200 F.3d 1218 (9th Cir. 2000).

e. Postcomplaint investigation of October 1 grievance

Respondent's investigation of Laufer's October 1 grievance was admittedly more thorough than its investigation of his January 15 grievance. The second investigation included interviews with Chris Rex, with Laufer and his attorney, as well as a review of his ASO personnel file and a search for other relevant documents.

The General Counsel contends this later, more thorough, investigation demonstrates the inadequacy of Respondent's investigation of the earlier grievance, and at the same time argues that it does not show any good faith on the part of Respondent because it was undertaken after the complaint had issued concerning the January 15 grievance. Respondent's conduct with respect to the October 1 grievance is not alleged in the complaint as an independent violation of the duty of fair representation.

Respondent contends a more thorough investigation was undertaken because the grievance was clearly timely, being based on the October 1 failure of the ASO to initiate the reseating process and the events leading up to that decision, as well as not being affected by Laufer's contradictory individual contract,⁸ and raising the "fraudulent inducement" claim, couched for the first time in that particular language.

I find the more thorough investigation of the October 1 grievance is not probative of the "perfunctory" nature of the earlier investigation, because the action grieved—the October 1 failure to begin the reseating process—was different. Likewise, various other aspects of the factual situation were different, including the fact Laufer had signed no individual contract agreeing to sit third chair. However, on the other side of the coin, the more thorough investigation of the October 1 grievance is likewise not probative of Respondent's good faith in the earlier investigation, since it was undertaken after complaint had issued.

f. Merit of grievance

The General Counsel contends that the potential merit of Laufer's grievance is not relevant to the analysis, but nevertheless contends that the grievance is meritorious. One of the rea-

⁸ Laufer had signed no individual contract for the 1999–2000 season.

sons cited by the General Counsel for the claim that the grievance had merit is another “promise” by Music Director Levi in 1999 to Laufer that if Respondent would pursue the grievance that he would start the reseating process. In fact, if the mere pressure from Respondent on the ASO would be enough to motivate the ASO to “settle” the grievance, this time in Laufer’s favor, then the merits of the grievance at arbitration would be unimportant. In any case, reliance upon any assurances by Levi is unconvincing, especially in the face of the ASO’s denial of the January 15 grievance, and in the face of Levi’s repeated unfulfilled assurances over the previous 8 years. Why this particular assurance is to be given any more credence than the assurances of Levi in 1991 that he would reseat Laufer in the second chair or the repeated assurances throughout 1999 that he would start the reseating process in September, is a question not answered by the argument of the General Counsel. In each instance, Levi was persuaded, either by other members of management or by the Principal cellist, to exercise his discretion NOT to reseat Klein.

Contrary to the General Counsel, and assuming *arguendo* the issue of merit has importance to the analysis of Respondent’s conduct, I find Laufer’s grievance was of doubtful merit. It relied upon two pieces of evidence—industry practice, which I have found supportive of Laufer’s position, and Levi’s oral assurance of 1991 and later written expression of his desire that Laufer sit in the second chair—to persuade an arbitrator to find contrary to two written individual contracts, and to the total discretion in reseating of the music director. It is unlikely in the extreme that an arbitrator would rely upon such evidence, even assuming Respondent could surmount the hurdle of the parole evidence rule, to force management to exercise its discretion to contravene the specific terms of two written contracts.⁹

3. Respondent’s “rational basis”

Respondent’s decision not to proceed with Laufer’s January 15 grievance was based on its inability to find that the ASO’s conduct violated the collective-bargaining agreement, and therefore believing the grievance lacked merit, according to its letters to Laufer of January 15, February 17, and April 7. Both Head and Giolito testified Laufer’s written submissions, the discussions at the January 14 meeting, the collective-bargaining agreement, and Laufer’s individual contracts were carefully considered in reaching this decision. I find this evaluation was

⁹ In addition, this evidence would be viewed by an arbitrator against the background of management’s repeated determinations, for at least seven seasons, not to exercise the discretion to reseat Laufer and consequently, Klein. It must be remembered that Music Director Levi had chosen, for 8 years—whether from timidity, persuasion, or other reasons—NOT to exercise his power to reseat Klein, or to stop the process on the few occasions when he took any initial steps. Management was vested by the collective-bargaining agreement with the power to reseat musicians, and prior to December 1996, this power was absolute, lacking even a procedural rein. That management did not do so for this entire period, even while certain members of management were assuring Laufer that it would be done, shows a pathetic failure of will, as well as exceedingly shabby treatment of Laufer. The fact that Laufer was treated shabbily, however, does not in and of itself establish that said shabby treatment would give rise to a meritorious grievance under the collective-bargaining agreement.

conducted in good faith and Respondent’s interpretation of the collective-bargaining agreement was not unreasonable.¹⁰ I find, as discussed in more detail above, there is no convincing evidence which would convert this facially neutral conduct into irrational, dishonest, arbitrary, or invidious conduct by Respondent.

In the January 14 meeting, Respondent’s Giolito could certainly have conducted himself in a more sensitive manner, could probably have demonstrated better listening skills, could have explained his reasoning and opinions more clearly, and could have been more forthcoming generally. However, such impolitic behaviors are not in themselves a violation of the duty of fair representation. “Lack of sensitivity,” inept manner, poor judgment, or negligence do not demonstrate unlawful hostility, nor do they supply the “something more” than mere negligence which is necessary to prove a violation of the duty of fair representation. *Furniture Workers Local 76B (Office Furniture)*, supra. In addition, because I have found Respondent did not undertake to process the grievance, nor willfully mislead Laufer to the effect it would do so, I find the cases cited by the General Counsel are inapposite. The correct standard is that of good faith evaluation of the merits of the grievance based on a reasonable interpretation of the collective-bargaining agreement. The fact Respondent’s interpretation of the reseating provision of the contract was similar to that of the ASO does not render its interpretation “arbitrary or invidious.” *Teamsters Local 337 (Swift-Eckrich)*, supra, 307 NLRB at 440; *Carpenters Local 415 (Cincinnati Fixtures)*, 226 NLRB 1032, 1033 (1976).

While it may be argued Respondent could have done a better job of investigating the grievance and communicating with the grievant, I find that Respondent did not venture beyond the “wide range of reasonableness” accorded to labor organizations in exercising discretion with respect to grievance processing. *Teamsters Local 337 (Swift-Eckrich)*, supra.

Based on all the foregoing, I recommend the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent, American Federation of Musicians & Atlanta Federation of Musicians, Local Union 148-462, is a labor organization within the meaning of Section 2(5) of the Act.

2. Atlanta Symphony Orchestra is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Respondent has not violated Section 8(b)(1)(A) of the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

¹⁰ I reject Respondent’s argument that one of the reasons it rejected Laufer’s grievance was untimeliness. First, I find insufficient evidence this asserted reason was raised during the discussions and letters involving the January 15 grievance, and second, since the seating issue was automatically reopened each season, the time bar would last no longer than until the next annual contract renewal or reseating date.

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the

ORDER

The complaint is dismissed in its entirety.

Board and all objections to them shall be deemed waived for all purposes.