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The Recording Musician and Union Power: A Case Study of the American Federation of Musicians

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THE RECORDING MUSICIAN AND UNION POWER: A CASE STUDY OF THE AMERICAN FEDERATION OF MUSICIANS

by
*Robert A. Gorman**

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This Article is a revised and updated version of a study prepared at the request of the Copyright Office and published in a volume of hearings on performers' rights. *See* SUB-COMM. ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE, OF THE HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 2D SESSION, PERFORMANCE RIGHTS IN SOUND RECORDINGS (Comm. Print 1978). In addition to the books, articles and other printed documents cited herein, this Article draws very heavily upon interviews (most of them conducted in 1977) with several persons, whom I would like to thank: Robert H. Crothers, Executive Assistant to the President, American Federation of Musicians; Henry Kaiser, AF of M General Counsel; Martin A. Paulson, Trustee of the Music Performance Trust Funds; Sanford I. (Bud) Wolff, Morton Becker, and John C. Hall, Jr., of the American Federation of Radio and Television Artists; and, most of all, Cecil F. Read, one of the principal characters in this Article, who provided time, documents and an extraordinary memory, and without whose good-natured and painstaking cooperation this Article could not have been written. A special word of thanks is due Barbara Ringer, who as Register of Copyrights identified the historical episode recounted here as worthy of detailed treatment and as likely to illuminate the debate surrounding the need for copyright protection of performers. Finally, I wish to thank Professor Matthew W. Finkin of Southern Methodist Law School, who encouraged me to seek publication in a worthy Law Journal.

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FOR nearly half a century, our national laws dealing with the employment relationship have either granted directly certain benefits—such as a minimum wage, a safe place to work, retirement benefits, and protection against discrimination on the basis of race or sex—or have left these benefits to be secured through the play of economic forces known as collective bargaining. There have been efforts over roughly the same period of time to grant, by action of Congress, compensation to performers whose performances have been captured on film or tape or phonograph record and then re-played by others for commercial profit. All such efforts have thus far failed. The Copyright Act of 1976¹ has no provisions for “performers’ rights” in recorded music or recorded speech, as distinguished from copyright in the musical composition or literary work being rendered. Labor organizations representing performers—instrumental musicians, singers and actors—have therefore attempted to secure such performers’ rights through the private mechanism of collective bargaining.

So long as no mechanical means existed for recording and recreating such performances, there was no concern about such performers’ rights or attendant royalties. Once, however, the inventive genius of such persons as Thomas Edison had produced the motion picture and the phonograph record, a person’s performance could be played far away, and played often. One obvious consequence was the very serious threat to that performer’s employment opportunities, as well as to the employment of other performers for whose services the recording could be substituted. Another consequence was the belief that, whether or not the performer’s employment was threatened, the performer should receive compensation when the performance was rendered from the recording, particularly when others reaped commercial benefits from the performer’s talents.

One group of performers for whom these problems have been acute are the instrumental musicians, who perform not only live but also on phonograph records and tapes, on filmed television programs and on motion picture soundtracks. These musicians are represented by the American

1. 17 U.S.C. §§ 101-810 (Supp. V 1981).

Federation of Musicians, which periodically negotiates labor agreements with employers in the various entertainment industries. There are, for example, separate contracts covering wages and working conditions for instrumental musicians working for the manufacturers of phonograph records, for the producers of television films, and for the producers of so-called theatrical motion pictures. The re-use of the "fixed" performances of musicians, generically referred to here as "recordings," has generated a conflict of interests between two constituencies within the union. One group consists of those who perform on these recordings. These persons hear the recordings replayed for commercial profit—on radio broadcasts, jukeboxes, wired-music services, or television broadcasts—and naturally wish to share in that profit, since their talents have contributed to it. The other group of affected musicians is that which has been ousted by the use of recorded music. These musicians would otherwise be asked to perform live—on radio and television programs, in theatres and nightclubs, in dancehalls, restaurants and hotels. This latter group reasonably feels that the recording musicians are responsible for their displacement, and that some of the profits from the commercial exploitation of recorded music should inure to the benefit of those whom that music has displaced.

There have been insistent pressures within the American Federation of Musicians to bargain not so much for performers' rights and performance royalties, but rather for the protection of the predominant segment of the membership that does not record for the phonograph record, motion picture, or television industries. These pressures retarded Federation endorsement of performers' rights in their collective bargaining agreements. It took what has been characterized as a "revolt" within the membership of the AFM, occurring in the late 1950s, to move the Federation leaders to a bargaining policy more protective of the interests of the recording musicians. This evolution (or revolution) in the philosophy and bargaining policy of the American Federation of Musicians is the subject of this Article.

I. THE RISE OF RECORDED MUSIC AND OF JAMES C. PETRILLO²

The phonograph, invented in 1877 by Thomas A. Edison, became a practicable device for home enjoyment between 1896 and 1900. Through technological improvements leading to greater fidelity of sound, orchestral recording became a reality in 1913, supplementing the emphasis in the preceding decade upon vocal performances, most notably those of Enrico Caruso. At first the phonograph record created more employment opportunities for instrumental musicians than it displaced. It was not until the

2. Most of the factual material recounted in this section and the two following sections is based upon two very thorough and useful works: R. LEITER, *THE MUSICIANS AND PETRILLO* (1953); and Countryman, *The Organized Musicians* (pts. 1 & 2), 16 U. CHI. L. REV. 56 (1948), 16 U. CHI. L. REV. 239 (1949). A less detailed, but still helpful, treatment of these facts and also of the origin and operations of the Music Performance Trust Funds, is to be found in ch. III of T. KENNEDY, *AUTOMATION FUNDS AND DISPLACED WORKERS* (1962).

1930s that the competition of records with live musicians became serious, as radio broadcasters came to rely extensively upon the playing of such records over the air.

Beginning in 1910, silent motion pictures—previously used as a novel adjunct in vaudeville theatres—became a commercial success in their own right, with the appearance of the multi-reel picture. This development brought a most substantial need for instrumental musicians. Some motion picture studios hired small musical groups to perform in the studios during filming, as a way of relieving some of the tedium of the actors' day. But far greater was the use of instrumental musicians in the theatres in which silent movies were exhibited. Theatre employment for live musicians increased tenfold. Many theatres hired a single musician, typically a pianist or organist, to provide mood music to accompany the silent film, while other theatres hired orchestras, some of substantial size, to accompany the vaudeville and film attractions shown under the same roof. By 1926 some 22,000 musicians were playing in American motion picture theatres. Contracts between theatre owners and the American Federation of Musicians served as some guarantee of continued employment.

Additional employment opportunities for musicians were generated by the emergence in 1920 of radio as a device for transmitting voice and music. A dearth of program material led to extensive reliance on phonograph records, but federal government regulations designed to achieve diversity of programming resulted in a limitation upon recorded music and the use of live musicians. At first, these musicians played for the radio stations without pay, as a means of publicizing their wares, but soon they became subject to wage scales negotiated between the local stations and the locals of the AFM. The duty to pay for live music induced radio stations to resort more frequently to phonograph records, which were often introduced in a manner that gave the radio audience the impression that the music was being performed live in the radio studios. Local employment opportunities were more seriously undermined in 1926 and 1927 when the NBC and CBS radio networks were formed, allowing transmittal of a single program through local stations to the entire nation.

Perhaps the most dramatic blow to the employment of live musicians was the advent of the talking motion picture. Warner Brothers released "The Jazz Singer" in 1927. Within two years, 2,000 theatres had installed sound equipment, the cost of which was substantially less than the cost of retaining a staff of musicians on a full-time basis. In 1929, the number of musicians performing for vaudeville and motion pictures fell from 22,000 to 19,000, and by 1930 it had fallen to 14,000. During that year the number declined precipitously to some 5,000 performing musicians in American motion picture theatres. This decline was accompanied by an all but total destruction of the power of the AFM in the theatres; a strike needs workers to call upon, and the refusal of live musicians to work could not close a theatre exhibiting sound motion pictures.

Many of the displaced musicians packed their instruments and moved to

the land of promise, Hollywood; but the motion picture studios provided employment for only some 200 or 300 of them, and they had to be of outstanding ability. Those who were hired by the motion picture producers were assured of some stability of employment through labor agreements negotiated by the AFM, which provided for the hiring of a minimum number of musicians in the studio's "staff orchestra," or the expenditure of a minimum amount of money annually for staff musicians. This chain of events caused many persons within the AFM to call for a ban on recording for motion picture soundtracks. Such a recording ban would probably have been unsuccessful, however, since musicians who were willing to play could have been wooed from the union by lucrative employment contracts. Moreover, such a ban would probably have been illegal, because a work stoppage directed against the producers as a means of procuring employment from theatre owners would likely have been treated as a secondary boycott, unlawful under both state tort law and the Sherman Antitrust Act.³ Joseph N. Weber, President of the AFM since 1900, decided instead to launch in 1929 and 1930 a public-relations campaign directed at inducing a public boycott of sound motion pictures, claiming that they were a debasement of music, but that met with little success. The decision of some locals to exert pressure directly on movie houses in 1936 and 1937, including the use in some cases of picket lines and sit-ins, met with a similar fate.

President Weber was, however, sensitive to the fact that motion picture soundtrack, like the phonograph record, could be re-used to the detriment of live employment opportunities, and he succeeded in securing restrictions on such use. The 1938 labor agreement between the AFM and the major studios provided that a motion picture soundtrack was to be used only "to accompany the picture for which the music was performed" and was not to be used for any other picture or purpose "except to accompany a revival of the picture for which recordings were originally made."⁴

At the same time as sound motion pictures were drastically reducing the need for live musicians in theatres, other events were limiting their employment opportunities elsewhere. There were, however, some countercurrents that retarded the decline. During the period from 1929 to 1932, phonograph record manufacturing dropped. Apparently, in a time of depression, the public was getting its principal pleasure from the musical and comedic material broadcast over the radio rather than from the purchase and playing of phonograph records. But in 1932, there was an upswing in the manufacture of records and the resulting employment of musicians in that industry. The major contributing factors were the lower-priced record, the rise of "swing" music and the proliferation of the juke-

3. 15 U.S.C. §§ 1-7 (1976).

4. That restriction on the use of soundtrack remains in the AFM contracts to this day, almost verbatim, and is qualified by only a limited number of exceptions, such as the "dubbing" of the soundtrack onto phonograph records; in such cases, the original motion picture recording musicians are paid at scale wages as if they had performed on the phonograph record.

box. From 1920 to 1933, live musical performances in hotels, restaurants and nightclubs were adversely affected by the lack of liquor to which the music could serve as accompaniment. The demise of Prohibition at the end of 1933 generated an increase in such "club dates" for musicians. But the major and most insistent threat to live performers in the 1930s came from the use of recorded music on radio programs.

The year 1930 witnessed the development of the so-called electrical transcription, which made it possible to record fifteen minutes of a radio program on a single sixteen-inch disc, and then to use that disc for delayed rebroadcast, either on the West Coast the same day or anywhere in the nation months or years later. Soon after, the Muzak Corporation became the major force in "wired music," which involved a private hook-up to a central station playing musical transcriptions, which were transmitted to hotels and restaurants. In radio broadcasting itself, the Federal Radio Commission loosened its limitations upon the use of phonograph records on the air, and this policy was continued by its successor agency, the Federal Communications Commission, created in 1934. (Those agencies did, however, take steps to assure that the broadcaster announced that the music was being played from phonograph records and not by a live orchestra.) Radio broadcasters responded to the public's increasing taste for popular music by playing more records. In the late 1930s, more than half of the music played on American radio stations was transcribed or was from phonograph records. Local radio stations throughout the country were making less use of full-time "staff orchestras" and of "casual" musicians both because of the availability of recordings and because of the spread of the radio network systems.

During this time, a young man of influence within the American Federation of Musicians was gravely concerned about the threat that recorded music posed to the economic wellbeing of musicians. He was James Caesar Petrillo, who became president of Local 10 in Chicago in 1922, when he was thirty years old. Petrillo, earlier than any other leader within the labor movement, emphasized that technological unemployment within the field of instrumental music was different from other trades or crafts. In other trades workers were displaced by the inventions of entrepreneurs, while it was the musicians themselves who were responsible for making the recordings that displaced their fellow artists. From this fundamental premise, Petrillo early concluded that one way to avoid technological unemployment was for musicians simply to cease forging the instruments of their own destruction, that is, to cease recording. Petrillo also concluded somewhat later that to the extent musicians did make recordings, they were obliged to mitigate the harmful economic impact upon their fellow musicians.

While president of the Chicago local, Petrillo organized the first AFM strike against broadcasters to combat their use of recordings. In 1931, Local 10 called a strike by Chicago radio musicians, in part to prevent the use of records on commercial broadcasts. The strike was settled through the

broadcasters' concessions on other matters. The Chicago local then announced in early 1937 that it would not permit its members to make recordings or transcriptions unless the local officers could assure that there would be an end to "the menacing threat of canned music competition." Petrillo, and the policies he effected in Local 10, carried weight at the annual convention of the Federation in 1937, which gave its mandate to President Weber to begin an economic battle against the encroachments of mechanical music.

Weber entered negotiations in 1937 with representatives of the radio broadcasting industry and of the transcription and phonograph record companies. He declared that he was prepared to order his musicians to cease performing on radio and to cease recording, if that was necessary to assure increased employment of musicians by the radio stations. The two-year agreements negotiated with the radio broadcasters provided for a very substantial increase in the size of radio staff orchestras. The networks and their affiliates, which previously had been spending \$3,500,000 yearly in musicians' wages, agreed to spend an additional \$2,000,000 per year. The 1938 agreements with the recording companies required those companies to place on each record label a restrictive legend similar to "only for non-commercial use on phonographs in homes." The objective was to impose an "equitable servitude" on the recordings, so that the musicians could enjoin their use on radio broadcasts. Both the "quota" contracts with the broadcasters and the record-label strategy were soon subjected to legal challenge.

As the radio "quota" contracts were about to be renegotiated in 1939, Assistant United States Attorney General Thurman Arnold published a list of union practices that he asserted to be clear violations of the Sherman Act and that the Antitrust Division would prosecute with vigor. The list included "unreasonable restraints designed to compel the hiring of useless and unnecessary labor." In an attempt to avoid this peril, the AFM relegated its labor negotiations to the local level, between local stations and individual union locals. But, although wage scales of radio musicians moved up in the period 1940 to 1947, the number of staff musicians employed by the radio networks and local stations fell from 2,237 to 1,939. By the end of that period the average local radio station employed less than one-third of a full-time musician.

The more widely known legal attack upon the collective bargaining strategy of President Weber was directed at the record-labeling requirement contained in the labor agreements between the AFM and the recording industry. Phonograph records commonly bore such labels as "for home use only" or "not licensed for radio broadcast," in the hope that remote purchasers—such as radio stations—would be bound thereby. Several "name performers" who had organized themselves as the National Association of Performing Artists instituted a number of test suits in the late 1930s against radio broadcasters that refused to abide by the warning on the label. Several of these suits were successful, the most important

being the 1937 decision of the Supreme Court of Pennsylvania in *Waring v. WDAS Broadcasting Station, Inc.*⁵ In that case, Fred Waring, who had been hired to perform on radio under the sponsorship of the Ford Motor Company, sued radio station WDAS, which had purchased a Waring recording bearing a conspicuous warning legend and played it over the air; Waring objected to the competition this gave his own live performances. The Pennsylvania courts enjoined the unauthorized use of the phonograph record.⁶ This victory was, however, short-lived. The United States Court of Appeals for the Second Circuit reached a contrary result in 1940 in the famous case of *RCA Manufacturing Co. v. Whiteman*.⁷ There, the court held that the sale of the recordings of the Paul Whiteman orchestra resulted in the loss of state copyright protection because it was a "general publication,"⁸ and that the restrictive legend neither saved the copyright nor imposed an enforceable equitable servitude upon purchasers of the recordings.⁹ The *Whiteman* court further held that state doctrines of unfair competition could not overcome the preemptive implications of the federal copyright scheme, which dictated free use of creative works not protected under federal law.¹⁰ The impact of this decision was great, both because it was expressed in a most thoughtful opinion by the most highly regarded jurist of his day, Learned Hand, and because the Second Circuit encompassed New York, a center for record production and sales and for radio broadcasting.

The *Whiteman* decision is uniformly regarded even today by representatives of recording artists as one of the most grievous blows that American law has inflicted upon these artists.¹¹ The effect of *Whiteman* was that radio broadcasters were legally entitled, upon payment of the price of a phonograph record, to exploit and re-exploit for their own commercial advantage the public's desire to hear the major recording artists of the day. The decision forced the American Federation of Musicians to look elsewhere for ways to pressure the broadcasters to refrain from so utilizing recorded music as to destroy the employment opportunities of live musicians. The Federation soon realized that direct economic pressure could be such a device, and that the obvious targets of such economic pressure were the record manufacturers and the broadcasters. The more forward-looking labor leaders appreciated that the broadcasters could weather a work stoppage fairly well because they could rely on the very source of the musicians' distress, the phonograph record.

After the broadcasting and record negotiations of 1937 and 1938, President Weber came under sharp verbal attack from local president Petrillo,

5. 327 Pa. 433, 194 A. 631 (1937).

6. 194 A. at 642.

7. 114 F.2d 86 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940).

8. 114 F.2d at 88-89.

9. *Id.* at 89.

10. *Id.* at 90.

11. As discussed later in the Article, the other unwelcome legal actions were a product not of the courts but of Congress.

who was gaining increasing notoriety within the AFM. Petrillo was known in part for his tough stance within Local 10 on the question of mechanical recordings and in part for the fact that the Chicago musicians were the highest paid in the union. By 1940, Weber—at the age of 75—had served as the AFM President for 40 years. That year, he announced his retirement, and James Caesar Petrillo at the age of 48 was elected President of the Federation.

II. THE 1942 RECORDING BAN AND THE CREATION OF THE RECORDING AND TRANSCRIPTION FUND

Petrillo's experiences in Chicago in 1937 and 1938, when he had ordered his musicians not to record, suggested to him that a nationwide ban could be fully effective in preventing the use of recordings on radio. To consolidate the position of the AFM as a prelude to any such recording ban, Petrillo took two major steps shortly after his election as Federation President.¹² Many solo instrumentalists, accompanists and symphony orchestra conductors were members of the American Guild of Musical Artists, and not of the AFM; a recording ban could be undermined if the AGMA musicians would not cooperate. Petrillo threatened in August 1940 to withhold from AGMA artists the services of musicians who were members of the AFM. Although the AGMA leaders resisted this campaign and filed suit to stop it, they finally capitulated, and by February 1942, ninety-nine percent of the solo concert instrumentalists had become members of the AFM. Another two-year campaign was successfully waged by Petrillo to organize the last holdout in American symphonic orchestras, the Boston Symphony Orchestra. The AFM Annual Conventions of 1941 and 1942 authorized Petrillo to ban the making of records and transcriptions.

In June 1942, Petrillo notified the recording and transcription companies that AFM members would not record after August 1. The nationwide recording ban went into effect as threatened, and all recording ceased. Petrillo's target was not so much the recording industry, which he made clear he would happily support if their recordings could be limited to home use, but rather the broadcasting industry. The recording ban generated a public uproar, with seventy-three percent of the American public favoring legal action against Petrillo; a Senate committee investigation; expressions of concern about the impact of the recording ban, and the resulting decrease in the flow of new records to radio stations, upon the morale of our fighting men and women; and a public-relations war between the AFM and organized labor here and abroad on one side, and the recording companies and broadcasters, who often controlled newspapers as well, on the other.

In 1942, Assistant Attorney General Thurman Arnold filed an antitrust action in federal court in Chicago seeking an injunction to prevent the Federation, its officers and directors, from continuing the recording ban.

12. See R. LEITER, *supra* note 2, ch. 7.

The government claimed that the Federation was in violation of the Sherman Act, by attempting to restrain commerce in phonograph records and electrical transcriptions and to eliminate competition between recorded music and live music. The complaint pointed to the elimination of records for home use, for radio use and for use in jukeboxes. The government also leveled other charges against the defendants. In July 1942, Petrillo had ordered an end to twelve years of Saturday afternoon radio broadcasts of performances by high school orchestras from the National Music Camp at Interlochen, Michigan; the defendants were charged with seeking to eliminate all live radio performances of music by persons not members of the union. Petrillo had since 1940 required radio networks to boycott affiliated stations that failed to hire a standby orchestra when network musical programs were transmitted through the local stations; the antitrust complaint alleged that the defendants illegally sought to require radio stations to hire standby musicians whose services were "neither necessary nor desired." This lawsuit was a part of Assistant Attorney General Arnold's campaign to use the Sherman Act to prevent featherbedding and the interference by labor with the adoption of improved mechanical methods reducing the demand for labor. The National Association of Broadcasters filed a brief *amicus curiae* in support of the Government's contentions. The district court granted the Federation's motion to dismiss.¹³ The court held that the defendants' acts were not enjoined and did not violate the Sherman Act.¹⁴ The pertinent federal statutes—the Clayton Act¹⁵ and the Norris-LaGuardia Act¹⁶—declared lawful the use of a work stoppage or the threat of a work stoppage in pursuit of the union's objectives in a "labor dispute." The case was held to involve such a "labor dispute," because the Federation was in effect seeking a "union shop" in the broadcasting industry, directed both against nonunion live performers such as the Interlochen orchestra and against phonograph records and electrical transcriptions.¹⁷ The United States Supreme Court summarily affirmed the dismissal.¹⁸

At the same time, in February 1943, the Federation proposed that recording companies should pay to the union a fee in the nature of a royalty for each phonograph record and transcription made by union members. The union would disburse these moneys so as to reduce unemployment caused largely by these mechanical reproductions. The union fund would provide work through live concert performances, free to the public, which would foster musical talent and music appreciation. This "trust fund" proposal was the imaginative creation of President Petrillo, whose philosophy it was to have an industry, thriving upon the services of recording musicians, contribute to the economic well-being of those musicians ousted

13. *United States v. American Fed'n of Musicians*, 47 F. Supp. 304, 309 (N.D. Ill. 1942), *aff'd*, 318 U.S. 741 (1943).

14. 47 F. Supp. at 309.

15. 29 U.S.C. § 52 (1976).

16. *Id.* § 101.

17. *United States v. American Fed'n of Musicians*, 47 F. Supp. 304, 308 (N.D. Ill. 1942).

18. 318 U.S. 741 (1943).

from work by such recordings. His memories of the grievous loss of theatre employment for union members, resulting from motion picture soundtrack, were still vivid in Petrillo's mind. The record and transcription companies, however, rejected his proposal. They objected to placing these moneys within the union's uncontrolled discretion and they in principle resisted the claim that they had any obligation to persons, identified merely by their membership in the union, who had never been their employees. Negotiations foundered, and the strike continued on into the summer of 1943, a year after it had begun.

The recording companies managed fairly well to weather the cessation of the musicians' services. They had built up a backlog of new recordings just before the strike, and they were able to make new pressings of records made earlier. They made new recordings without using instrumental musicians, relying heavily on unaccompanied vocalists or on vocalists who were accompanied by instruments not then covered by AFM rules or contracts, such as harmonicas, ocarinas, ukeleles and one-man bands. There were some, but limited, sale of "bootleg" records and of records made in Mexico and Cuba. Because of the war, raw materials used in record manufacture, particularly shellac, were in short supply, so that the production of new records would have been limited even apart from the recording ban. Nonetheless, the recording companies attempted to exert some pressure for a settlement—after conciliation efforts had failed regarding the union's proposal for a trust fund—by taking their case to the National War Labor Board. The NWLB was empowered to investigate disputes over contract negotiations, direct the parties to adopt specific settlement terms, bring those terms to the attention of the public, and ultimately to have them enforced by governmental seizure of the business in the event the Economic Stabilization Director found "that the war effort will be unduly impeded or delayed" by continuance of the dispute. The NWLB asserted jurisdiction. While a panel of the Board was holding hearings, however, the strike took a dramatic turn.

In September 1943, Decca Records—which along with Columbia and RCA Victor produced almost all of the phonograph records in the United States, and which itself produced one-quarter of the total—signed a contract with the Federation. Within a month, several large transcription companies and twenty-two small record and transcription manufacturers signed the Decca contract. The companies agreed to pay royalties on each phonograph record sold, ranging from one-fourth cent on a thirty-five cent record to two and one-half percent of the sale price of records selling for more than \$2.00. The royalty on electrical transcriptions was three percent of the company's gross revenue from their sale, lease, or license.¹⁹ The royalties were to be kept by the Federation in a separate fund, called the Recording and Transcription Fund, and were to be used "only for purposes of fostering and propagating musical culture and the employment of live musicians, members of the Federation." By March 1944, almost

19. Transcriptions used only once by any one radio station were royalty-free.

eighty small recording and transcription companies had signed the Decca agreement. RCA Victor and Columbia, however, along with the NBC transcription division, stood firm. In part, they were fearful that the union's royalty demands, if successfully imposed upon them, would inevitably be presented to their parent broadcasting companies, the National Broadcasting Company and the Columbia Broadcasting System.

The hold-out recording and transcription companies continued to press their case before the National War Labor Board. In March 1944, a three-member panel of the Board recommended that the musicians should be ordered to return to work and that no royalty plan should be approved. In June 1944, the full Board, while agreeing that the record ban should end immediately, approved the concept of a union welfare fund and ordered arbitration of the amount and disposition of the royalty payments. Petrillo refused to accede, since he had already secured favorable terms from other companies that might be jeopardized by less favorable terms in an arbitration proceeding (since the existing agreements contained a so-called "most favored nation" clause). The NWLB order was not made the subject of a seizure order by the Economic Stabilization Director, since the continuation of the recording ban only at RCA Victor and Columbia could hardly be said to impede the war effort unduly. The public outcry continued, however, as did informal governmental pressures. In October 1944, more than two years after the recording ban had begun, President Roosevelt sent a telegram to Petrillo, appealing to his patriotism and citizenship, and urging him to end the ban and to abide voluntarily by the order of the National War Labor Board. Petrillo refused. Among other things, he pointed out that agreements had already been reached with 105 recording and transcription companies, and that he was in no position to give RCA and Columbia more favorable terms.

The companies that had signed the agreement returned to full production. Shellac imports increased. Decca began to record a larger share of the new popular songs, and recording artists began to switch to Decca from RCA Victor and Columbia, the most celebrated example being Jascha Heifitz, who left RCA to sign a nonexclusive agreement with Decca in October 1944. The competitive pressures on the two major hold-out companies became too great. In November 1944, almost twenty-seven months after the recording ban began, RCA Victor and Columbia agreed to terms, and full production was restored in the recording industry.

The contract that was signed by the major recording companies, by smaller record companies totalling roughly 600, and by electrical transcription companies had a termination date of December 31, 1947. The wage provisions were, however, renegotiated in October 1946, and the Federation was able to secure substantial wage increases, resulting in scale payments of \$41.25 for three hours of regular recording or \$38.50 for two hours of recording by symphony orchestras. These wage figures will play an important part in this story of the union, because no further wage increase was negotiated by the AFM for recording musicians until the end of

1958, while payments into the fund newly created under the 1943 and 1944 contracts mounted significantly. Royalty payments to the union for the Recording and Transcription Fund accumulated from 1943 to 1947. The union administered these payments separately from general union moneys; no part was used to pay the salary of any union official. Union disbursements from the fund began in early 1947, and were designed to provide employment for musicians through the offering of live concerts, without admission charge, in such places as parks, ballrooms, concert halls, schools and hospitals. The fund was divided among the approximately 700 locals of the union, with each local (except for the three largest, in New York, Los Angeles and Chicago) receiving \$10.43 for each member in good standing; the three largest locals were entitled to this sum for each of their first 5,000 members and to only \$2.00 for each additional member. Because almost all of the phonograph recording took place in these three cities, this "discrimination" rankled many of the recording musicians, who felt that their share of disbursements from the fund was not commensurate with the fund income that had been generated by their recording services. Local union officers disbursed these allocations to unemployed members of the local for their services at public concerts.²⁰ Every program planned by any local required advance approval by the national union.

The amount collected by the Federation and placed in the Recording and Transcription Fund through the end of 1947 totalled approximately \$4,500,000, substantially all of which was expended between 1947 and 1949. Contributions from the locals and from civic organizations and local governments frequently supplemented this expenditure. Nearly 19,000 performances were given, generating more than 45,000 paychecks. The types of performances in order of decreasing frequency included teen-age dances, entertaining units, band concerts, orchestra concerts, regular dances, jazz concerts, parades, and symphony concerts. The success of the fund was principally attributable to the boom in the production of phonograph records at the end of the war. In 1945, 165,000,000 records were sold; in 1946, the figure rose to 275,000,000; and in 1947, to 350,000,000 sales. The three-percent royalties from the licensing of radio transcriptions generated only a relatively small part of the fund.

III. UNION ATTEMPTS TO INCREASE RADIO EMPLOYMENT, AND THE LEA ACT

The AFM did not devote its energies during World War II exclusively to the elimination of phonograph records as a threat to live musical performance by union members on radio. Other union policies were designed directly to promote employment on network and local radio stations. As noted above, Federation locals in the late 1930s succeeded in negotiating "quota" agreements requiring minimum dollar expenditures on staff musi-

20. Accusations were frequently made that the local officials were allocating fund payments to reward their friends, regardless of their unemployment status.

cians by local stations. Although the availability of phonograph records to the radio stations, and the manpower shortages of World War II, generated substantial pressure to reduce the number and size of staff orchestras, Petrillo continually worked to maintain and indeed to increase the number of musicians employed in radio broadcasting. The Federation's policy called for the locals to negotiate for the hiring by the radio stations of a specified minimum number of musicians; these individualized quotas were based upon the station's financial status and to some degree upon its previous employment figures. The Federation was in a better position to extract such quota agreement from local stations that were network-affiliated, as distinguished from independents; the networks, which were more dependent upon the services of live musicians and thus upon the good graces of the union, often exerted gentle pressure upon the recalcitrant affiliated station to capitulate to the union's demands. The Federation used several techniques for eliciting cooperation from the networks. A number of networks carried the music of name bands from live performances in hotels, and those bands could be barred from playing for the networks. The union could also call out the network staff musicians and thus cut off all "sustaining" musical programs; commercial programs, in which the musicians were under contract to individual sponsors or their producers, could still be broadcast. Finally, the Federation could threaten or effect a total strike against the networks and the sponsors. Although the union rarely used this device, NBC and CBS in 1945 lost the services of musicians on two popular commercially sponsored programs.

The Federation's objective of increasing employment in the local stations was carried out through other methods as well. Stability of employment in those stations was threatened by the increasing use throughout the 1930s of so-called cooperative programs by the networks. These programs originated at the network, and blank periods were provided into which local commercials could be inserted by local stations to which the program was fed. The Federation contended that these "co-op" programs were displacing many local bands, since local sponsors no longer had to place their advertisements through local programs utilizing local musicians. Accordingly, in late 1940, Petrillo ordered members of the AFM not to perform on such co-op programs, many of which were then forced to turn to vocal rather than instrumental musical backgrounds.²¹

FM broadcasting, which began just before the war, gave promise of increased employment for musicians, except when AM broadcasters simultaneously transmitted on FM outlets. In October 1945, the AM notified broadcasters that its members would not perform on simultaneous AM-FM broadcasts unless a standby orchestra was employed. If, for example, the network staff orchestra utilized ninety-five musicians for the simultane-

21. The Federation's ban, aimed immediately at the sponsors or producers employing live musicians, could fairly be characterized as a secondary boycott, since its ultimate object was to induce the local stations to hire more musicians. Congress did not explicitly declare such secondary pressure illegal until the passage of the Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-167, 171-187 (1976 & Supp. V 1981)).

ous broadcast, ninety-five more would have to be hired—simply to “stand by”—for the period of the broadcast. Alternatively, the broadcaster would be expected to pay a “standby fee” to the union.

Standby musicians also had to be used by radio stations when their programs featured musical performances by amateurs, military bands, nonunion musicians, or traveling musicians from other jurisdictions. The AFM often effected the outright banning of these kinds of performances. Its most controversial action was Petrillo's order in July 1942 to remove from the air a long-running program carrying student concerts from the National Music Camp at Interlochen. Petrillo aggravated matters by boasting in early 1944, “Nor was there in the year 1943 any other school band or orchestra on the networks and there never will be without the permission of the American Federation of Musicians.” The airtime thus preserved for professional musicians was miniscule, but the public outcry was enormous. Bills passed the Senate on two occasions prohibiting interference with the broadcasting of noncommercial cultural or educational programs.

In the House of Representatives, however, the anti-Petrillo sentiment was more deeply felt. Many Congressmen viewed the Interlochen decree as part of a pattern of dictatorial behavior, manifested in a host of actions contrary to the public interest, such as the recording ban of 1942-44, a controversial eleven-month strike in 1944-45 directed against local station KSTP in St. Paul, and the negotiation of employment quotas and standby orchestras in radio broadcasting. In 1945, Congressman Clarence F. Lea sponsored comprehensive legislation (H.R. 5117) directed at a number of these practices.²² Technically, the Lea Bill was an amendment to the Communications Act of 1934²³ dealing with radio broadcasting. As introduced, the bill outlawed “the use of force, violence, intimidation, or duress, or . . . the use or express or implied threat of the use of other means” where the object was either to compel a broadcaster to employ “any person or persons in excess of the number wanted by” the broadcaster; or to compel a broadcaster to take action designed to generate pay for live musicians on radio whether or not their services were actually performed; or to compel a broadcaster or any other person (obviously including manufacturers of phonograph records or electrical transcriptions) to pay an exaction for, or to impose restrictions upon, the use or sale of recordings or transcriptions in connection with broadcasting.²⁴ In short, the targets were the Federation's attempts at featherbedding as a means of artificially maintaining employment in radio broadcasting, and the union's attempts to prevent the use of phonograph records and transcriptions in such broadcasting. The recommended sanctions for violation were fine and imprisonment. The bill made it clear that broadcasters and recording companies were free to agree to such arrangements voluntarily, and that any such agreements

22. H.R. 5117, 79th Cong., 1st Sess. (1945).

23. Ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-609 (1976 & Supp. V 1981)).

24. H.R. 5117, 79th Cong., 1st Sess. (1945).

could be enforced by the union. The bill outlawed only the compulsion of such an agreement.

One need only skim the legislative debates on the floor of the House and Senate to sense the deeply felt antipathy toward Mr. Petrillo. As one Congressman stated:

I agree that this bill is aimed at Petrillo. Let us not kid ourselves. He is the man we are after. We are not after the fellow who blows the horn or plays the violin or plays the piano. We are after Petrillo, the man who runs the union like a dictator.²⁵

The accompanying committee report systematically listed the kinds of demands made by Petrillo and the Federation upon the broadcasting industry in previous years.²⁶ The report referred to millions of dollars extorted from the broadcasting industry, and opined that "if demands now pending were granted it would, by these racketeering and extortion methods, require the broadcasting industry to pay tribute probably much in excess of \$20,000,000 a year for peace against these boycotts, strikes, and threats."²⁷

25. 92 CONG. REC. 1556 (1946). There were constant references to Petrillo as a dictator, with emphasis placed on his middle name and analogies made to Capone and Hitler. *Id.* at 1546, 1556. Almost every speaker made reference to some incident in his district in which a military band or a school band was forbidden to play because of an edict from Petrillo. The ban on the Interlochen broadcasts was especially condemned. *See id.* at 1544, 1547, 1550-51. Petrillo was the focal point for attacks upon a wide range of abuses, although the Lea Bill directly addressed only a few of these. References were made to Petrillo's authority under the Federation bylaws to suspend the constitution and bylaws as well as other rules adopted by the membership, *id.* at 1548, 1558; to the fact that the Federation's ban of amateur and military bands on the air portended yet greater control over the content of radio programming, *see id.* at 1563; to the fact that Petrillo uniformly put his selfish interests over the interests of patriotism and over the appeals of his President, *id.* at 1549; to the union's interference with the live performances (as opposed to performances on the radio) of amateur and military groups, *id.* at 1548, 1550; and to the fear that Petrillo's actions, including the demand for standby charges and royalties for transcription licensing, would serve as an example for unions in other industries, *see id.* at 1550, 1556.

26. H.R. REP. NO. 2508, 79th Cong., 2d Sess. 3 (1946) identified the following demands:

That broadcasters employ persons in excess of the number wanted; that in lieu of failure to employ such persons the broadcaster should pay to the federation sums of money equivalent to or greater than funds required for the employment of members of the federation; that payments for services already performed and fully paid for should be repeated; that payments should be made for services not performed; that broadcasters should refrain from broadcasting noncompensated, noncommercial educational or cultural programs; that broadcasters should refrain from broadcasting musical programs of foreign origin; that tributes should be paid for using recordings, transcriptions, and other materials used for broadcasting; that restrictions should be placed on the manufacture and use of recordings or transcriptions for the purpose of restricting or preventing the use of such materials for broadcasting; that tributes should be paid for recordings previously paid for; that dual orchestras should be employed for a single broadcast over two or more outlets; that over 400 small broadcast stations in the country having no live orchestras would be compelled to employ such orchestras; that the use of voluntary noncompensated orchestras be barred from broadcasts unless an orchestra of the Federation of Musicians were also employed or that the union was paid an equivalent or greater amount than the regular charge for a federation orchestra.

Id., quoted in 92 CONG. REC. 1543 (1946).

27. H.R. REP. NO. 2508, 79th Cong., 2d Sess. 3 (1946).

Petrillo's activities had engendered such hostility among Congressmen that it was a foregone conclusion that some version of the Lea Bill would be enacted. Some voices, however, were raised against it. The Congress of Industrial Organizations pointed out several of the more troubling features of the bill. The ban upon "duress" or of "other means" could be understood to outlaw not merely intimidation, but also a speech, a pamphlet or other publicity, or the "threat" of an individual to quit work. Such a ban, particularly in view of the criminal penalties, was said to be unconstitutional for vagueness and an impairment of free speech and press.²⁸ The ban on compelling the hiring of more employees than the broadcaster "wanted" made it possible for the employer freely to overwork its employees to the point of threatening their health and safety, without any recourse for the union to peaceful concerted measures in support of collective bargaining.²⁹ Congressman Marcantonio of New York expressed dismay that the law would make it a crime to engage in a peaceful strike, and that Congress was for the first time attempting to fix employment relations in the broadcasting industry by limiting collective bargaining. He pointed out the unfair advantage given to broadcasters when workers could be jailed for giving speeches or issuing pamphlets in support of demands for increased employment.³⁰ Congressman Celler, also of New York, suggested that while Petrillo's solution for unemployment in broadcast music was unsound, so too was that of the Lea Bill. He suggested that Congress should instead consider creating a system of royalty payments to recording musicians when their recordings were utilized commercially.³¹

For the most part, these appeals fell on deaf ears. Several motions were made on the floor of the House to amend the bill, but they were voted down. One amendment would have stricken from the bill the language "or by the use or express or implied threat of the use of other means";³² this would have sheltered a peaceful strike designed to achieve the employment of more workers or to obtain payments when records are played. Another amendment would have substituted for the bill's criminal penalties an action for an injunction and the loss by the union and individual wrongdoers of the protection normally given concerted activity under the National Labor Relations Act; in substance, the violators would be subject to discharge.³³ Another amendment would have limited application of criminal penalties to the officers of the union rather than to all of the

28. 92 CONG. REC. 1546 (1946).

29. *Id.*

30. *Id.* at 1545-46:

It is a bill to increase the profits of broadcasting monopolies at the expense of workers and not a bill to protect children's orchestras, as its proponents would have us believe. This bill definitely provides for imprisonment for striking and definitely increases the profits of licensees and broadcasting companies at the expense of the American musicians and other workers in the broadcasting industry.

31. *Id.* at 1547.

32. *Id.* at 1559.

33. *Id.* at 1559-60.

union's members as their agents,³⁴ while yet another would have limited liability to those who committed an overt act accompanied by a threat of physical force or violence.³⁵ This concern on the part of some legislators for the severity of the criminal sanctions proposed in the Lea Bill was not shared by most members of the House. Their view was that the Federation's activities involved "moral turpitude akin to that of larceny, embezzlement, the acquisition of another's property by false pretenses, racketeering, and extortion."³⁶ They also felt that a \$1,000 fine was not unfair given the \$20,000,000 per year that the AFM was allegedly extorting from the broadcasters.³⁷ Another unsuccessful amendment—which properly understood would have substantially destroyed the principal objective of the legislation—would have permitted the union to "strike for any objective which may be lawfully obtained through negotiations."³⁸ This amendment would have sheltered strikes to secure standby orchestras or standby payments, and strikes to secure royalty payments on recordings and transcriptions, since such terms could under the statute be lawfully negotiated and lawfully incorporated in a labor agreement.

Although these amendments failed, representatives of the Committee did adopt one amendment while the issue was under discussion on the floor of the House. Rather than making it unlawful to compel a broadcaster to employ more workers than were "wanted by such licensee," the House inserted instead the phrase "needed by such licensee to perform actual services."³⁹ The change was an important and favorable one for the musicians, for it rendered the test for featherbedding somewhat more objective. As thus amended, the Lea Bill passed the House on February 21, 1946, by a resounding vote of 222 to 43.⁴⁰

Because the House bill differed from the more confined bill passed by the Senate, a conference committee was convened, and the bill that issued was in all pertinent respects the same as the Lea Bill as passed by the House. Perusal of the floor debates in both Houses shows that there was substantial misunderstanding and disagreement as to certain central provisions of the bill. There was, for example, disagreement as to whether a union could legally strike to secure a contract provision giving royalties to musicians for repeated broadcasts of the recordings on the radio.⁴¹ Moreover, in spite of the rather clear terms of the bill, which would sustain the validity of such a contract provision if voluntarily agreed upon, and which would validate "the enforcement or attempted enforcement, by means lawfully employed," of any such contract provision, controversy remained as to whether a union could strike to enforce such a royalty provision already

34. *Id.* at 1562.

35. *Id.* at 1564-65.

36. *Id.* at 1543.

37. *Id.*

38. *Id.* at 1562-64.

39. *Id.* at 1564.

40. *Id.* at 1566.

41. *Id.* at 3244, 3251-54.

in a labor agreement.⁴² Some Congressmen regarded even efforts to negotiate such a provision as within the ban of the Lea Bill.⁴³ Nor was there a common understanding as to whether the number of employees “needed” by the broadcaster was to be conclusively determined by the broadcaster itself or by a court of law.⁴⁴ Finally, confusion remained as to whether the payment of royalties for the use of phonograph records or transcriptions was even an “exaction,” coercion to secure which would be unlawful; some Congressmen understood that term to embrace only unlawful payments from the broadcasters and not payments by way of royalties or compensation.⁴⁵

Undaunted by the failure to secure understanding, let alone agreement, on these fundamental issues, the House passed the conference bill on March 29, 1946, by a vote of 186 to 16.⁴⁶ The Senate followed suit on April 6, 1946, by a vote of 47 to 3 (with 46 members of the Senate not present and not voting).⁴⁷ On April 16, President Truman signed the Lea Act into law.⁴⁸ The full text of the Act is set forth in an appendix to this Article.

The Lea Act restricted the bargaining policies of the American Federation of Musicians in the broadcasting and recording industries, and carried far-reaching implications for performing musicians after 1946. Section 506(a)(1) outlawed strike threats—surely a form of “duress” or “other means”—to compel local stations or networks to hire a standby orchestra on “co-operative” programs, or on simultaneous AM-FM transmissions, or even to compel them to maintain or increase the size of their staff orchestras.⁴⁹ This section represented the beginning of the end for staff orchestras, at both the network and local levels. Staff musicians dwindled throughout the late 1940s and early 1950s, and there is today no staff orchestra on any radio network or station, or any television network or station, in the nation. Section 506(a)(2) made the ban on the union’s “standby” strategy more complete, by outlawing pressure on networks or stations to make payments to the union in lieu of hiring standby musicians.⁵⁰

Section 506(a)(3), which outlawed union compulsion to pay more than once for services “in connection with” the broadcaster’s business,⁵¹ was

42. *Id.* at 2821, 2823.

43. *Id.* at 2823, 3253-54.

44. *Id.* at 3245, 3256.

45. *Id.* at 3254.

46. *Id.* at 2823.

47. *Id.* at 3258.

48. Ch. 138, 60 Stat. 89 (1946) (codified at 47 U.S.C. § 506 (1976), amending Communications Act of 1934, ch. 652, 48 Stat. 1064), *repealed by* Act of Dec. 8, 1980, Pub. L. No. 96-507, 94 Stat. 2747.

49. 47 U.S.C. § 506(a)(1) (1976). If stations could demonstrate that they had no need for staff musicians, for example because music was adequately available through recordings, then union pressure to maintain any kind of staff orchestra, no matter how small, was illegal and subject to criminal sanctions.

50. *Id.* § 506(a)(2).

51. *Id.* § 506(a)(3).

very broad indeed. Presumably, however, the legislators had in mind the standby payments demanded of the networks for music played on co-operative programs and similar payments demanded of AM stations for simultaneous broadcasts on FM. Section 506(a)(4), which banned demands for money for services not to be performed, condemned standby payments for yet a third time.⁵² The language of sections 506(a)(3) and 506(a)(4) could also be read to outlaw demands upon a broadcaster to pay royalties to recording musicians each time the broadcaster aired a phonograph record or transcription. Such a reading was not necessary, however, since this conduct was more precisely outlawed in subsection (b) of the Act.⁵³

Subsection (a)(5) prohibited compulsion by the union to eliminate broadcasts of music performed by school bands, military bands, and amateur groups—and possibly musical performances in the course of religious services (a particularly offensive example conjured up by several Congressmen during the floor debates).⁵⁴ The 1943 Petrillo ban on the Interlochen broadcasts, and on the broadcasts of all school orchestras, was the principal target here. This statute did not, however, outlaw union pressure to ban such groups from live performances at hometown events, so long as these were not broadcast over the radio. Although Petrillo apparently had attempted to ban very few foreign broadcasts of music as a form of unfair competition with his own musicians, section 506(a)(6) banned that conduct too.⁵⁵

Section 506(a) having effectively outlawed all union pressure directly to increase employment of musicians by radio broadcasters, section 506(b) effectively outlawed union pressure to secure the same objective through imposition of restrictions on or royalties from recordings.⁵⁶ While subsection (a) banned coercion of “a licensee,” subsection (b) also banned coercion of “any other person.” Had the Lea Act been in effect during the 1942-44 recording ban, it would thus apparently have made it unlawful. One of the Federation’s objectives had been to compel producers of electrical transcriptions to pay to the union moneys based upon a percentage of profits derived from the use or licensing of those transcriptions for radio broadcasts. Assuming that a payment unwillingly made is an “exaction,” the union would have been coercing the transcription producer (“any other person”) to pay an “exaction for the privilege of, or on account of, . . . manufacturing . . . recordings [or] transcriptions . . . used or intended to be used in broadcasting.”⁵⁷ The victims now to be protected were the producers of transcriptions and not just the broadcasters; and they received protection whether the payments were to go to the union itself or to a third party, such as a separately administered special trust fund. Read broadly, the quoted language might even have barred union pressure upon a manu-

52. *Id.* § 506(a)(4).

53. *Id.* § 506(b).

54. *Id.* § 506(a)(5).

55. *Id.* § 506(a)(6).

56. *Id.* § 506(b).

57. *Id.* § 506(b)(1).

facturer of phonograph records for the payment of royalties on record sales (to the public generally as opposed to sales to broadcasters) in the event broadcasters played the same recorded song over the air.

Most clearly, section 506(b)(1) outlawed direct pressure upon the radio broadcaster for the purpose of securing an agreement to pay "performance royalties" to recording musicians when their records were played on the air.⁵⁸ Although Congressman Celler had suggested that Congress ought legislatively to provide for such royalty payments,⁵⁹ the Lea Act forbade the use of strikes and picketing to achieve that objective through collective bargaining.⁶⁰ Since most would agree that effective collective bargaining is premised upon the availability, if only in reserve, of peaceful concerted activities, the Lea Act virtually removed from the bargaining agenda between the Federation and the broadcasting industry the question of so-called re-use payments or royalties for recorded music. Economic constraints soon reinforced this legal constraint. A strike threat is credible only so long as Federation members are employed in the industry, and in the decade after passage of the Lea Act more and more radio stations and eventually the radio networks employed fewer and fewer staff musicians.

The language of section 506(b)(2), if broadly construed, prohibited strikes against the manufacturers of phonograph records where the object was to prevent the use of such records on radio broadcasts.⁶¹ The section bars use of duress or other means to force persons "to accede to or impose any restriction upon [the] production [or] use" of recordings or transcriptions for "the purpose of preventing [their] use" in broadcasting.⁶² The more obvious target, however, was the union's campaign of the preceding decade to have the recording companies place legends upon record labels purporting to restrict the records to home use and to bar them from use on radio broadcasts. Such legends had been declared in the *Whiteman* case to be legally unenforceable,⁶³ so that the ban in the Lea Act was of limited importance. But some states still treated those legends as creating enforceable servitudes on the records. Moreover, the *Whiteman* decision merely declared the legends unenforceable,⁶⁴ while the Lea Act declared the attempt to secure them criminal,⁶⁵ wherever done throughout the United States. Subsection (b)(2) also outlawed pressure by the union directly upon the broadcaster, where the object was to compel the broadcaster not to play phonograph records or electrical transcriptions on the air.⁶⁶ Section 506(b)(3) reinforced this congressional ban by effectively prohibiting union compulsion of broadcasters or transcription producers to pay royal-

58. *See id.*

59. 92 CONG. REC. 1574 (1946); *see supra* text accompanying note 31.

60. 47 U.S.C. § 506 (1976).

61. *Id.* § 506(b)(2).

62. *Id.*

63. *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86, 90 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940).

64. 114 F.2d at 90.

65. 47 U.S.C. § 506 (1976).

66. *Id.* § 506(b)(2).

ties for re-use of transcriptions containing musical performances when the musicians had been paid for their original performance.⁶⁷

In short, section 506(b) forbade the union to strike or picket in support of demands—certainly against broadcasters and in most instances against recording companies—for royalty or re-use payments for the broadcasts and the sales of phonograph records and transcriptions, and for restriction or elimination of recorded music on radio programs.

The Lea Act deprived the Federation of the power to achieve through collective bargaining not only some of its more objectionable goals but also some objectives that were an acceptable if not indeed laudable part of the campaign to protect the economic status of the professional musician in the face of widespread radio use of recorded music. Many Congressmen were prepared to take such action not merely because of their hostility toward Petrillo but also because of their beliefs about the economic status of the recording musician and musicians generally. When, for example, Congressman Marcantonio asked Congressman Brown, a member of the Lea Committee, how he could justify making unlawful the demand of musicians for royalties when their recordings were played on the air, Brown answered:

Let me say further, for the gentleman's edification and education, that today, as he well knows, union musicians are receiving higher compensation than ever before in history; that today there are more musicians employed in the United States than at any time in our history; that these recordings and radio appearances have made the musicians of the United States, and their profession, the most prosperous in all of our history, as well as in all the history of any nation on the face of the earth.⁶⁸

The activity outlawed by the Lea Act was not, however, as broad as might first appear. Notwithstanding the prohibitions of sections 506(a) and (b), subsection (c) expressly permitted the enforcement, by means lawfully employed, of any contract right that the union possessed against a broadcaster or recording company, whether the contract was made before or after the passage of the Lea Act.⁶⁹ Thus, although the Federation could not strike to secure standby payments or the banning of amateur orchestras from the radio or payment for the use of phonograph records or transcriptions, a broadcaster could voluntarily agree to such conditions and if it did, the Federation could enforce that agreement by lawsuit, arbitration or strike. In short, the Lea Act permitted negotiating for such contract provisions, but barred a strike to secure them. Although Congress could explain this anomaly by stating that its purpose was not to outlaw broadcaster decisions but rather to outlaw resort to extortion and racketeering by the AFM, the Lea Act reached beyond those union techniques and embraced the use of "duress" or "any other means."⁷⁰ Under these provi-

67. *Id.* § 506(b)(3).

68. 92 CONG. REC. 2823 (1946).

69. 47 U.S.C. § 506(c) (1976).

70. *Id.* § 506(a).

sions criminal sanctions turned upon whether the Federation was merely urging the broadcaster or record company to comply, or was "constraining" that person to comply. The statute also invited subterfuge on the part of the union at bargaining sessions; for example, if the union was negotiating with regard to both wages and re-use payments or standby orchestras, the union could designate any strike as a lawful strike over wage rates although the real pressure was being exerted on the "residuals" or "standby" issues. In any event, because section 506(c) permitted the continued enforcement of existing contract obligations, the Recording and Transcription Fund agreements of 1943 and 1944 between the Federation and the recording industry remained lawful and enforceable. The question remained, however, whether Federation pressure to renew the fund agreement after its termination on December 31, 1947, would be lawful under the Lea Act.

One month after the Lea Act became law, Petrillo and the Justice Department put it to the test. For several years, radio station WAAF in Chicago had employed three musicians on its staff. In May 1946, the Chicago local, with Petrillo as its President, in an effort to induce the station to hire three more musicians, directed the three employees to cease working and set up a picket line in front of the station's place of business. Petrillo was charged with criminally violating section 506(a) of the Lea Act by using duress or other means to coerce WAAF to employ persons "in excess of the number of employees needed by such licensee to perform actual services." Among other things, the Government pointed out that in the months subsequent to the strike call, the work of the three striking musicians was being performed by the switchboard operator and another woman in the office of the radio station.⁷¹

In December 1946, Judge La Buy of the Chicago federal district court sustained Petrillo's claim that the Lea Act provisions were unconstitutional, and dismissed the criminal charges.⁷² The judge held, first, that the due process clause of the fifth amendment was violated by making a crime of conduct so indefinite as coercing a broadcaster to employ persons in excess of the number "needed," a term that was too vague to be understood by persons of common intelligence.⁷³ Judge La Buy also noted that under the Lea Act the hiring of "unnecessary" employees—which would be lawful if done by the broadcaster on its own or under an agreement between the broadcaster and the union—would lead to a criminal conviction for officers and members of the union even when effected through "free speech as manifested by peaceful picketing."⁷⁴ He held that the stat-

71. See R. LEITER, *supra* note 2, at 160.

72. *United States v. Petrillo*, 68 F. Supp. 845 (N.D. Ill.), *rev'd and remanded*, 332 U.S. 1 (1947), *on remand*, 75 F. Supp. 176 (N.D. Ill. 1948).

73. 68 F. Supp. at 848-49: "Life and liberty may not be imperilled by or be subject to such a frail and uncertain device as one man's opinion against another's. The will of an individual [the broadcaster] to make an act a crime or not, depending upon his own judgment, is abhorrent to our form of government."

74. *Id.* at 849.

ute violated the first amendment by outlawing picketing that was not violent but rather was designed to disseminate the views of Petrillo and the AFM. As if the statute were not unconstitutional enough, Judge La Buy further held that the Lea Act violated the thirteenth amendment ban upon involuntary servitude by declaring criminal the quitting of work by the three musicians to compel WAAF to hire three more. Finally, the judge held that the fifth amendment was also violated by the Act's arbitrary classification in violation of due process of law.⁷⁵ He concluded that it was arbitrary to single out broadcasting station employees and to deprive them of the right to strike and picket in support of their demands, while workers in other American industries were accorded that right.⁷⁶

Through an expedited appeal pursuant to the Criminal Appeals Act, the dismissal of the charges was directly reviewed in the United States Supreme Court, which reversed and remanded the case to the district court.⁷⁷ The Court held that, although the statements of an employer as to the number of employees "needed" was not conclusive,

We think that the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. . . . It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees.⁷⁸

The Court also held that Congress could properly single out and prohibit employee practices that injuriously affected commerce in the radio industry without banning all comparable practices in all other industries.⁷⁹ Finally, the Court concluded that under the appeals statute it was required to pass upon the constitutionality of the statute only upon its face, and not as charged under the facts of the complaint.⁸⁰ Accordingly, the Court held that the claim that the Lea Act was applied in this case to punish peaceful picketing and to compel involuntary resumption of employment was not ripe for the Court's scrutiny.⁸¹

On remand, Judge La Buy construed section 506(a)(1) so as to render it all but ineffective. The judge held that the Act could be violated only if the prosecution could prove that Petrillo had knowledge that the three additional musicians were unnecessary. Because sufficient proof of knowledge was lacking, the prosecution had failed to prove its case.⁸²

75. *Id.* at 849-50.

76. *Id.* at 850.

77. *United States v. Petrillo*, 332 U.S. 1 (1947).

78. *Id.* at 7.

79. *Id.* at 9.

80. *Id.* at 12.

81. *Id.* at 13. The three dissenting Justices were prepared to hold the Lea Act provisions in question unconstitutional for vagueness. *Id.* at 17 (Reed, J., dissenting).

82. *United States v. Petrillo*, 75 F. Supp. 176, 181 (N.D. Ill. 1948). The evidence at the trial before him showed that the three members of the Federation employed by WAAF

No criminal prosecutions under the Lea Act have been reported since the 1948 *Petrillo* decision. Events after 1948 rendered it unnecessary in any event to resort to the Lea Act. For one, the work stoppage against broadcasters became increasingly ineffective as a union weapon as the number of musicians employed by broadcasters dwindled. It is ironic that in the *Petrillo* case itself, the "extortion" and "compulsion" feared by Congress caused no inconvenience to the operations of the radio station. At least as significant, strike threats against radio networks (which for a number of years still retained staff musicians) aimed at pressuring local radio stations to retain their own staff musicians or to hire standby musicians now fell within the proscription of the Taft-Hartley Act of 1947.⁸³ That Act banned the secondary boycott, upon charges in an administrative proceeding before the National Labor Relations Board. In such a proceeding the Board could promptly secure a federal court injunction against the continuance of the threat or the use of strikes or picketing.

Whatever the reasons may have been—the Lea Act of 1946, the Taft-Hartley Act of 1947, a new round of congressional hearings directed against the AFM in 1948—the Federation in 1948 reversed a number of its bargaining positions in the broadcasting industry. Petrillo lifted the ban on radio broadcasting by school orchestras, although the Interlochen Camp remained on the AFM unfair list and radio stations declined to carry broadcasts of its concerts. New three-year contracts between the union's locals and the network originating stations expressly authorized simultaneous AM-FM transmissions without any extra pay for the musicians or for the union. The Federation announced that it would no longer pressure the networks to compel affiliated local stations to hire additional musicians.

worked as record librarians, and that the station consumed 90% of its broadcast time playing records and electrical transcriptions. In May 1946, Petrillo had served notice on the station that it should hire three more musicians. After an exchange of telegrams and letters the station stated that it could hire only one more musician, while Petrillo stated that he would order the three musicians to withdraw their services, which he did, and they withdrew. In these dealings as well as in previous negotiations, Judge La Buy found the relationship between the station and Petrillo to be "cordial and cooperative." *Id.* at 180. Moreover, station employees testified that neither they nor the station were even inconvenienced by the walk-out. The court also noted that the Lea Act did not outlaw the use of the strike to enforce existing contract provisions. *Id.* At the time of the Petrillo demand and the walkout, the three musicians had individual contracts of employment with the station and those contracts explicitly incorporated the constitution and bylaws of the Chicago local, which in turn explicitly empowered the local president to withdraw the services of union members should he determine this would protect the interests of the local or its members. Further, WAAF never actually informed Petrillo that it had no need for the services of three additional musicians, and Petrillo at all times understood that these additional musicians were to perform actual services. The judge paid little attention to the fact that the station devoted 90% of its time to recorded music and that Petrillo was purported to say shortly before his arrest that he was purposely violating the Lea Act in order to test its constitutionality.

83. 29 U.S.C. § 158(b) (1976).

IV. THE TAFT-HARTLEY ACT, THE RECORDING BAN OF 1948, AND THE CREATION OF THE MUSIC PERFORMANCE TRUST FUNDS

Three provisions of the Taft-Hartley Act of 1947 were of particular pertinence to the American Federation of Musicians. Section 8(b)(4) declares it an unfair labor practice for a labor organization to induce a secondary boycott.⁸⁴ Although the contours of the secondary boycott have never been altogether clear, it is fairly certain that several AFM tactics used in the early 1940s would have been illegal after 1947. Those tactics included the ban on performing for network programs in order to induce affiliated stations to hire more musicians and the ban on making electrical transcriptions when the object was to induce radio stations to hire musicians.

Section 8(b)(6) is the featherbedding provision of the Taft-Hartley Act.⁸⁵ The bill that Taft endorsed, and that was ultimately approved, forbade a union "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."⁸⁶ Even this more narrow proscription encountered some resistance from those who argued that the section might improperly be read to bar the pursuit of traditional labor objectives, such as job safety and rest periods.⁸⁷ Ironically, on the day Congress voted to override the veto of the Taft-Hartley Act by President Truman, on June 23, 1947, the Supreme Court handed down its decision in the *Petrillo* case upholding the constitutionality of the Lea Act.⁸⁸

Perhaps the most serious threat to the Federation policies of the *Petrillo*

84. *Id.* § 158(b)(4).

85. *Id.* § 158(b)(6). An earlier version of this section in the House bill was patterned upon the Lea Act, and outlawed the demand by a union to employ "persons in excess of the number of employees reasonably required by such employer to perform actual services." When this bill was considered by a conference committee, the Senate conferees rejected it as unduly broad. In explaining their reasons on the floor of the Senate, Senator Taft spoke while *United States v. Petrillo* was on appeal to the Supreme Court:

The Senate conferees, while not approving of featherbedding practices, felt that it was impracticable to give to a board or a court the power to say that so many men are all right, and so many men are too many. It would require a practical application of the law by the courts in hundreds of different industries, and a determination of facts which it seemed to me would be almost impossible. So we declined to adopt the provisions which are now in the *Petrillo* Act. After all, that statute applies to only one industry. Those provisions are now the subject of court procedure. Their constitutionality has been questioned. We thought that probably we had better wait and see what happened, in any event, even though we are in favor of prohibiting all featherbedding practices. However, we did accept one provision which makes it an unlawful-labor practice for a union to accept money for people who do not work. That seemed to be a fairly clear case, easy to determine . . .

93 CONG. REC. 6441 (1947). Not surprisingly, the illustration given by Senator Taft of the meaning of § 8(b)(6) came from the music industry. He said that it would be an unfair labor practice for a union to insist that a person hire 10 musicians even though he had physical room for only six, and would therefore have to pay the other four for not working. *Id.*

86. 29 U.S.C. § 158(b)(6) (1976).

87. 93 CONG. REC. 6441, 7561 (1946).

88. 332 U.S. 1 (1947). See generally *American Newspaper Ass'n v. NLRB*, 345 U.S. 100 (1953).

years was section 302 of the Taft-Hartley Act.⁸⁹ That section makes it unlawful for an employer to pay or to agree to pay money to any union representing its employees, and for any person to request or accept such payment.⁹⁰ The obvious targets were union extortion and management bribery of union officials. Section 302(c)(5) declares those provisions inapplicable, however, to money paid to a trust fund established by the union “for the sole and exclusive benefit of the employees of such employer, and their families and dependents,” provided the payments are for health care, pensions, compensation for injuries or accidents, unemployment benefits, or insurance for these contingencies, and provided “employees and employers are equally represented in the administration of such fund.”⁹¹ While Congress was considering this legislation in 1947, it became evident that the exemption provisions would not reach the AFM Recording and Transcription Fund, disbursements from which were completely within the control of the Federation. Although the ban of section 302 was not to govern contracts already in existence,⁹² the agreements with the recording and transcription companies were to expire on December 31, 1947, and any negotiations for contract renewal would be governed by section 302.

Petrillo was not anxious to share with management administration of the fund. Even if the fund were jointly administered, the law appeared to prohibit provision of benefits for persons who had never been employees of the recording and transcription companies. Yet it was a cornerstone of the Petrillo philosophy that recording royalties should be used to benefit not the recording musicians but other musicians throughout the country who had been displaced by the use of recorded music on radio broadcasts, in jukeboxes, and through wired-music services such as Muzak. Such uses had grown even more prevalent since the end of World War II.

Never one to shrink from the use of economic force in the face of inhospitable legislation, Petrillo announced in October 1947 that upon the expiration of the contracts with the phonograph record and electrical transcription companies, all AFM musicians would cease recording. His notice to the recording companies stated that it was “our declared intention, permanently and completely, to abandon that type of employment.” Petrillo acted pursuant to a resolution adopted at the 1947 AFM Convention, which authorized the Executive Board to order a recording ban at the expiration of the current agreements. That summer authorization was an invitation to the recording companies—which had been through a recording ban only three or four years before—to produce and stockpile master records that could be used for pressings during the period when the musicians refused to record. The recording ban went into effect on January 1, 1948. Petrillo agreed in February to allow recording of transcriptions for network shows if the disc was used only once and then discarded; this

89. 29 U.S.C. § 186 (1976 & Supp. V 1981).

90. *Id.* § 186(a)-(b) (1976).

91. *Id.* § 186(c)(5) (Supp. V 1981).

92. *Id.* § 186(f) (1976).

concession permitted delayed broadcasting of normally live network programs on the West Coast. With this one exception, no recordings were made.

The companies did not initially rush to end the stoppage because record stockpiles were high and transcriptions of many commercials and radio programs could be done with vocalists only (aided on occasion by ocarinas and ukeleles). As the months went by, however, the stockpiles diminished and some foreign recordings and "bootleg" recordings by anonymous or pseudonymous American musicians made their way onto the market. In May 1948, the transcription companies filed charges of secondary boycott with the National Labor Relations Board against the Federation and the New York and Los Angeles locals. The transcription companies alleged that the recording ban forced them to cease doing business with the radio stations, which were the true "primary" targets of the union's strike. Surprisingly, there was no resort to criminal prosecution under section 506(b)(2) of the Lea Act.⁹³ Even the Taft-Hartley charges ultimately foundered, as in December 1948, the regional director of the New York office of the NLRB refused to issue a complaint under section 8(b)(4) against the Federation or its locals. Perhaps it was believed that the true purpose of the 1948 recording ban, unlike the 1942 ban, was not to prevent the use of recordings on radio broadcasts and thus to increase the use of live musicians, but rather to restore the payments to and benefits from the trust fund in the interests of part-time and unemployed musicians. Such a union objective was not so clearly "secondary."⁹⁴

Although some of the recording companies engaged in legal maneuvering, most were anxious as 1948 wore on to reach a settlement with the Federation. A committee representing those companies met with union representatives in an attempt to perpetuate the trust fund in a manner that would be consistent with the Taft-Hartley Act. It was agreed that this could probably be done if the fund were to be administered by an independent Trustee rather than by the union. The union and representatives of the four major recording companies (RCA Victor, Columbia, Decca, and Capitol) and three smaller companies reached a tentative agreement on October 28, but the companies conditioned their participation upon an assurance of legality from their attorney, from the Department of Justice, and from Senator Taft, co-sponsor of the Taft-Hartley Act! After receiving assurances from their attorney, the record companies submitted copies of both their proposed labor agreement and the proposed trust agreement to the United States Attorney General, who in turn consulted with the Solicitor of Labor of the Department of Labor. Both of

93. 47 U.S.C. § 506 (1976). Since the apparent purpose of the recording ban was to end the playing of records and transcriptions on the radio, one would think that a violation of the Lea Act could readily be made out.

94. There was considerable evidence, however, that the Federation's purpose was indeed to remove recorded music from radio. Petrillo had commented that the strike was directed not at the 80% of phonograph records used in the home, but rather at the 20% used on radio broadcasts.

these officials concluded that the proposed trust fund was lawful, because the Trustee—who was to be selected by the recording companies and not by the union—was not a “representative” of the AFM. Any payments from the companies to the Trustee were thus not within the ban of section 302 of the Taft-Hartley Act. Senator Taft had by then rendered a similar advisory opinion. The parties executed the 1948 Phonograph Record Trust Agreement and the 1948 Labor Agreement on December 14, 1948, and the 1948 Electrical Transcription Agreement on December 20, 1948. Recording promptly resumed, almost one full year after the strike had begun.

The trust agreements in the recording industry were to run for five years. Royalties from phonograph record sales and transcription licensing, at substantially the same rates as obtained under the earlier Recording and Transcription Fund Agreement, were to be paid to a Trustee nominated by the record companies collectively and appointed by the Secretary of Labor. The 1948 agreements specifically provided that the Trustee was not to act as a representative of the union or of any person receiving payments from the trust fund. The Trustee was directed to perform his functions “on the sole basis of the public interest.” He was to distribute money so as to provide employment for instrumental musicians throughout the country, whether or not they were union members, in concerts free to the public “in connection with patriotic, charitable, educational, and similar programs.” The Trustee was to engage musicians at the prevailing local union wage scale and arrange performances upon the advice not only of the AFM but also of business, civic and charitable groups and organizations. The Trustee was to distribute moneys among localities throughout the United States and Canada, in areas bounded by the jurisdiction of the various union locals, and in amounts based upon a per capita count of the local union members. All local expenditures were to be supervised by the trustee and were not to be used to reward union supporters or otherwise to enrich the local union or any private commercial enterprise. The first Trustee named by the record companies, with the concurrence of the AFM, was Samuel R. Rosenbaum.⁹⁵

95. Mr. Rosenbaum was an attorney, a member of the Pennsylvania Bar and engaged in private practice in Philadelphia. In his capacity as chairman of the Labor Committee of the National Association of Broadcasters and of a group of independently owned radio stations, Rosenbaum had conducted negotiations in 1937 on the opposite side of the table from the AFM. There was nothing in his background to suggest that he would act as a representative of the union in the administration of the trust funds. Upon assuming his duties in December 1948, Rosenbaum considered various methods by which the funds could be most efficiently administered. His efforts have been described as follows:

He determined that it would not be practical to set up branch offices in each of the areas he was required to serve. In accordance with the terms of the Trust Agreements, he, therefore, sought the assistance of the National Recreation Association, Community Chest, American Red Cross, Kiwanis Clubs, Rotary Clubs, and other business, musical, welfare and educational organizations, but none of these was prepared to assume the burdensome responsibilities attendant upon producing recommendations of worthwhile projects in the hundreds of areas to be served. As provided in the Trust Agreements, he also sought the assistance of the AFM. Mr. Petrillo and the International Executive Board of

Having created trust funds in the recording industry, the American Federation of Musicians turned its attention to other industries in which recorded music was seen as displacing the services of live musicians. One such industry was television, which burst upon the American scene after the war. Petrillo, initially uncertain about the implications of television for professional musicians, had in 1945 ordered union members not to render services on television programs. This ban was removed in 1948, in contracts between the major networks and the major Federation locals. Most of the television shows in the late 1940s were performed live, but the Hollywood studios soon began to produce a substantial number of filmed programs exclusively for television use, as distinguished from theatrical exhibition. In its first collective bargaining negotiations with Hollywood producers of television films, the Federation negotiated not only a labor agreement covering wages and working conditions for musicians recording on those films but also a trust agreement, which generated payments from the producers to a newly created trust fund similar to that established in the phonograph recording and transcription industry. The labor agreement required the signatory companies to execute the trust agreement simultaneously and authorized the union to terminate the labor agreement in the event the signatories failed to perform their obligations under the trust agreement. In effect, producers of television films could not secure the services of musicians unless they first agreed to contribute to the trust fund.

The signatories of the 1951 Television Film Trust Agreement were Samuel R. Rosenbaum as Trustee and the producers and distributors of films or soundtracks for television. The agreement covered the use on television, at any time in the future, of films produced during the term of the agreement and embodying performances of Federation musicians, or pictures of such performances. When these films were shown on television for the first time the signatory producers or distributors or their licensees would make payments to the trust fund. In most instances the payment amounted to five percent of the company's gross revenues from the use or

the AFM refused to have anything to do with the administration of the Trusts, fearing that AFM participation would run afoul of the Taft-Hartley Act, but they finally were persuaded by the Trustee to permit the AFM locals to make recommendations as to projects which the Trustee might sponsor in their respective areas.

Shapiro v. Rosenbaum, 171 F. Supp. 875, 882-83 (S.D.N.Y. 1959) (footnotes omitted). The locals thus assumed the principal responsibility for making recommendations for free public performances, all such recommendations to be approved by the Trustee. A local representative also was expected to attest that each performance had actually been rendered, as a condition to the Trustee's mailing a separate paycheck to each of the participating musicians.

The Trust Funds and Mr. Rosenbaum were to become central characters in a future conflict of major dimensions within the American Federation of Musicians. Another significant element in that conflict was the fact that the 1948 labor agreement for the recording musicians provided for a wage scale of \$41.25 for a three-hour recording session. This was the same scale figure as had obtained under the 1946 agreements in that industry, and under the terms of the 1948 agreement that scale was to continue to prevail for five more years through December 31, 1953.

exhibition of the film on television, for as long as the film was so used or exhibited. Even films exhibited by network producers on so-called sustaining programs, which contained no commercials and for which the producers received no revenue, generated for the trust fund two and one-half percent of the production cost of the film whenever the film was shown on the network.

Soon after the negotiation of the television film labor and trust agreements, the Federation negotiated labor and trust agreements covering the production of commercials for television—the so-called “jingles and spot announcements” agreements. The trust fund agreement was between Trustee Rosenbaum and the producers and distributors of the film or soundtrack for television commercials. The companies agreed to pay the Trustee \$100 for any jingle or spot that used the services of musicians, when first exhibited on television. Unlike the royalty for television films, this was a one-time payment.

The fourth trust fund, also administered by Samuel Rosenbaum, was based upon the revenues derived from the release to and exhibition on television of films initially made for exhibition in motion picture theatres. The labor agreements between the Federation and the motion picture studios had provided since 1939 that the music on the soundtrack of a theatrical motion picture could be used only with that film or with a revival of it. These agreements attempted to bar the development of “library” soundtracks from older films for re-use in films subsequently produced. Later, the Federation agreed to permit “dubbing” of film soundtrack onto phonograph records, provided the film musicians were paid therefor at the rate they would have received had they made the record themselves. The Federation required similar re-use payments when portions of a film soundtrack were used in “radio transcriptions to exploit the picture.” The Federation was, however, less certain about the wisdom of permitting theatrical motion pictures containing the services of musicians to be used on the emerging medium of television. Section 11(I) of the labor agreement negotiated in September 1946 between the Federation and the major motion picture producers—including MGM, Paramount, Twentieth Century Fox, RKO, Warner Brothers, Columbia, Universal, Republic—and representatives of the larger independent producers provided that the producers were not to transfer, use, or authorize the use on or in connection with television of soundtracks or films containing performances by musicians, except after negotiations with and upon written consent of the Federation. The 1946 agreement also provided that the producers would incorporate this provision in any agreement they might make regarding the licensing or utilization of soundtrack and in all employment contracts with motion picture musicians.

The Federation modified this ban on the television exhibition of theatrical motion pictures in their May 1951 agreements with the film producers. The labor agreement of that year provided that theatrical motion pictures produced either before or after 1946 could be released for television exhi-

bition, provided the soundtrack containing musical performances was completely re-recorded by a new orchestra, with the musicians being paid at the current scale for film recording. At the same time, the motion picture producers agreed to make payments into a trust fund for theatrical films released to television, such payments to continue so long as the motion picture was used on television. The producers were to pay Trustee Rosenbaum five percent of the gross revenues derived from the "use, exhibition, exploitation, rental, or other dealing with any film" on television.⁹⁶

Thus, by 1952, the four Music Performance Trust Funds were receiving payments from four sources: the phonograph record and transcription companies, paying roughly one percent of the sales of records and three percent of the revenues from the use of transcriptions; the producers of theatrical motion pictures, paying five percent of the gross revenues from the release and continuing exhibition of such films on television; the producers of films for television, paying five percent of the gross revenues from the exhibition of such films; and the producers of television jingles and spot announcements, paying \$100 upon the first showing. By far the greatest proportion of the trust funds came from phonograph records. Throughout the 1950s the total payments to and allocations from the Trust Funds increased each year.⁹⁷ In spite of the health of the Music Performance Trust Funds, however, the health of the profession itself was by no means on the upswing in the post-war period.

V. THE STATE OF THE ENTERTAINMENT INDUSTRIES, 1945-1955

The history of the entertainment industries in the decade between 1945 and 1955 was dominated by the rise of television broadcasting. Commercial programs first began to appear on television as early as 1941, and in 1943 Petrillo set the wage scale for musicians performing on television. As World War II was drawing to a close, however, Petrillo and the International Executive Board (IEB) of the Federation became uncertain of the direction that television would take and whether it would generate more employment for musicians or would instead generate filming or recording techniques that permitted the re-use of television programs and the possible displacement of musicians. Accordingly, in February 1945, Petrillo and the IEB reversed their policy of cooperation with the new medium and forbade musicians to play on either live or filmed television.

This same uncertainty about the implications of television motivated Petrillo in the 1946 negotiations with the motion picture producers. Petrillo

96. "Gross revenues" was defined as the "genuine selling, leasing, or licensing price for each broadcast of the film on television" as fixed in a bona fide arm's length transaction. By an addendum to the agreement with the producers, they later agreed to make a one-time payment to the Trust Fund for each documentary film shown on television.

97. In the fiscal year ending June 30, 1950, after the first full year of the funds' operation, exclusively in the phonograph record and transcription industry, \$900,000 was disbursed; \$1,400,000 in fiscal 1951; \$1,700,000 in 1952; \$1,950,000 in 1953; \$2,200,000 in 1954; \$2,300,000 in 1955; \$2,800,000 in 1956; \$3,900,000 in 1957; \$4,850,000 in 1958; and \$6,325,000 in 1959. In one decade the fund had increased sevenfold.

demanded that the producers refrain from releasing to television any motion pictures originally made for theatre exhibition. Discussing these negotiations more than a decade later, Petrillo claimed that he had no fixed idea of protecting any particular group of musicians; his object was simply to "tie up" the motion picture so that it could not be freely utilized in another medium. He did, however, suggest that the principal beneficiaries of the restrictive provision were the musicians employed by the radio broadcasting industry: if old theatrical motion pictures were to preempt television time, there would be fewer opportunities for radio musicians to work for the television broadcasters. There was surely no conception in 1946 that the restrictive clause could be used as leverage to secure re-use payments for the film musicians when their films were released to and exhibited on television. Petrillo believed that the film musicians were extremely well paid, and that it was more important to preserve work for other less affluent members of the union.⁹⁸ Ultimately the motion picture producers reluctantly acceded to the ban upon the release to television of theatrical films. The motion picture industry was riding the crest of a financial wave in 1946 and was dependent upon the hundreds of musicians working in staff orchestras at major studios; Petrillo's warnings of a possible strike induced the studios to submit to the television ban.

This hostility on the part of the Federation to the television use of musical performances was soon relaxed. In early 1948—shortly after Petrillo had declared an end to the recording of phonograph records and electrical transcriptions—Petrillo lifted the ban on performing for television, and the union negotiated network contracts governing wages and other working conditions in the television studios.⁹⁹ In the next network negotiations, in 1951, agreements were reached covering radio broadcasting, which made provision for the continuation although not the expansion of staff orchestras; television broadcasting, which made no provision for staff orchestras and which contemplated the making of kinescopes of live programs for one-time delayed showing within sixty days for any affiliated stations; and television films, which provided for the payment by the network-producers to the Music Performance Trust Funds of five percent of their gross revenues from the exhibition of those films.

The Hollywood motion picture bubble began to burst in 1947, and several studios soon realized that one relatively painless way to turn a quick profit was to sell old theatrical motion pictures to television. By 1950, several of the smaller motion picture studios had been joined by Republic Studios in seeking a relaxation of the Federation's ban upon the television

98. Deposition of James C. Petrillo in *Atkinson v. American Fed'n of Musicians*, No. 670,348 (Cal. Super. Ct., L.A. County), at 62, 64-72, 100, 113-18, 131-35, 141 (Apr. 29-30, 1958) [hereinafter cited as *Deposition of James C. Petrillo*].

99. These 1948 contracts with the networks, which ran for three years, devoted principal attention to the work of radio musicians. The contracts abandoned earlier restrictive AFM policies that required the hiring of standby orchestras or payment of standby wages when a musical performance was broadcast simultaneously on AM and FM stations or when cooperative programs were fed to local affiliates by the networks.

use of theatrical films. In the motion picture industry negotiations of 1951, the AFM agreed to permit the producer to release their films to television, provided several conditions were satisfied. First, the producer was required to score an entirely new soundtrack for each picture, using the same number of musicians as had been used in making the original soundtrack. Second, the producer was to pay the musicians the prevailing scale rates for the recording of television film, which were at the time \$50 per musician, \$100 for the leader, \$100 for the orchestra manager, \$150 for the arranger, and \$50 for the copyist. Third, the producer was to pay to the Music Performance Trust Fund five percent of its gross revenues derived from the television exhibition of the motion picture.¹⁰⁰ Some producers quickly learned that it was not feasible to score and use an entirely new soundtrack, either because of the overlay of music with the spoken words of the actors or because the track could not physically be separated from the motion picture film. This led to a situation in which many producers would hire a new orchestra simply to make a "dummy" soundtrack that was never used. Soon musicians were hired to assemble, play a few notes, and collect a paycheck; one studio held a dummy scoring session in which thirty-seven films were scored in one hour and the musicians were each paid \$1,850.

The producers and Petrillo realized that the situation was intolerable, and a new agreement was reached in September 1952. The agreement abolished dummy recording sessions and permitted producers to use the original soundtrack upon making a one-time payment to the original film musicians of one-half of the 1952 scale. The producers were to continue to contribute five percent of their gross revenues to the Trust Fund. The Trust Fund would also receive the payments due any film musician in the event he or his widow could not be located. Under the 1951 agreement requiring re-scoring, some \$477,300 was paid to Hollywood musicians; and under the 1952 agreement payments (until June 1955) totalled \$279,400.¹⁰¹

While television was emerging in the late 1940s and early 1950s as a pre-eminent medium for American popular entertainment, radio was not faring well. Not surprisingly, neither were the musicians in radio staff orchestras. Staff orchestras on local radio stations were dwindling to the point of disappearance. The need for local musicians was slim indeed, given the all but total reliance of most stations either on network programming or on recorded music. This trend toward the playing of phonograph records or transcriptions on radio accelerated greatly as the public turned to television for the kind of dramatic and comedy shows that had formerly been more common fare on radio. Even the network staff orchestras based in New York, Los Angeles, and Chicago, which had each provided full-time employment for between forty and sixty-five musicians, began to shrink, as

100. *Hearings Before a Special Subcomm. of the House Comm. on Education and Labor on Investigation with Respect to the Operations of the Contributions to Musicians Performance Trust Funds*, 84th Cong., 2d Sess. 135 (1956) [hereinafter cited as *Trust Fund Hearings*] (testimony of Phil Fischer).

101. *Id.* at 135-36.

did the orchestras hired by sponsors for network radio programs. As television became the principal medium for advertising commercial wares to the public, more and more radio shows were cancelled and the networks gradually became unable to afford staff orchestras of any size. Musicians made transcriptions of the theme music or cue music for popular radio shows, and these were re-used for two or three years. Although this process generated contributions to the Music Performance Trust Fund, it eliminated employment opportunities for the radio musicians. Today, none of the radio (or television) networks or local radio (or television) stations employs staff orchestras.

There was some slight trade-off in television work for musicians, however, once the three-year ban on performing on television was lifted by Petrillo in early 1948. Musicians were widely utilized on television variety shows and provided background music for dramatic programs and situation comedies. But the television networks had learned during the three-year ban on live music that in many instances they could rely instead on "canned music," including phonograph records and particularly the soundtrack of foreign motion pictures.¹⁰²

This resort to canned music for television programs again came to the fore after 1951, when the Federation permitted musicians to play for films made especially for television but required the producers to pay five percent of their revenues to the Music Performance Trust Fund. In such cases the musicians making the film might be paid a total of \$1,200, while the producers paid \$2,000 upon the first exhibition of the film on television and more for later showings. The recording musicians received no re-use payments for such later showings. Since the producers could score that same program with canned music for not much more than \$100, they often avoided the use of live musicians. It became quite an art to cut and paste the soundtrack of old foreign films and "compose" with them to provide musical background for television film. More punctilious producers of television films had original music written and then took it abroad for recording, where labor costs were lower and the obligation to contribute to the Trust Fund could be escaped altogether. Between 1952 and 1955, only some twenty percent of the music for television films was scored by live American musicians, while the balance was scored with foreign or canned music, or had no music at all.¹⁰³ The problem was compounded by the Federation's policy at that time not to supply live musicians to producers who used any canned soundtrack on any of their television films. In 1954, the Federation modified this policy in the hope that employment opportunities in television films for American musicians would increase.¹⁰⁴ No significant increase resulted. The musicians hardest hit by this use of canned or foreign music were the members of Local 47 in Los Angeles,

102. The AFM contracts with American producers restricted use of a soundtrack apart from the film for which it was made.

103. *Trust Fund Hearings*, *supra* note 100, at 45 (charts of major findings).

104. *Id.* at 83.

since it was they who in the early 1950s performed on more than ninety-five percent of the television film using live American musicians. The Hollywood musicians believed that their plight was in considerable measure attributable to the Trust Fund policies of the Federation.

Musicians in the phonograph record industry were at the same time witnessing a diminution of their income, but this was produced not by any suppression of the sale of records, but rather by an increase in the cost of living. Between 1945 and 1955, retail sales of phonograph records were relatively constant,¹⁰⁵ and the emergence of new recording companies provided some new employment opportunities for recording musicians. But the wage scale for such musicians was exactly the same in 1953 as it had been in 1946, while in this period the cost of living rose more than thirty-five percent and the earnings of performing artists represented by other unions (such as the American Federation of Television Artists and the Screen Actors Guild) rose from ten to nearly sixty percent.¹⁰⁶

The health of the theatrical motion picture industry in the decade after 1945 was perhaps the most depressing of all.¹⁰⁷ Although there was a modest upturn in 1955 and 1956, this was attributable not to the production and distribution of theatrical motion pictures, but rather in substantial part to the increase in the production of films especially for television and in revenues from the sale of old theatrical motion pictures to television.¹⁰⁸ Indeed, the increasing number of releases of old films to television in the early 1950s was a mark of the depressed state of the motion picture industry. The major producers had previously been able to heed the requests of the distributors and exhibitors not to release these films to television in view of the serious competitive impact the releases would have on moviegoing. Such self-restraint in the release of old films paralleled the reluctance of the AFM to have such films released to television, given the possible effects upon the employment of live musicians. Ironically, the release of theatrical films to television no doubt further reinforced the flight of the American consumer from the motion picture theatre to the living room television set.¹⁰⁹

105. *Id.* at 57.

106. *Id.* at 52.

107. *Id.* at 57. The corporate income of motion picture producers before taxes had risen steadily from \$33 million in 1937 to a peak of \$309 million in 1946. In the same period the amount of money spent on motion picture attendance rose from \$676 million to \$1,692,000,000. A drastic reversal took place between 1946 and 1947. Corporate income fell steadily from \$309 million in 1946 to \$80 million in 1952, while money expended at the box office dropped to \$1,284,000,000; this, at a time when the cost of living, per capita income, and population of the United States were significantly mounting. Gross revenues of the 10 leading production companies fell from \$968 million in 1946 to \$682 million in 1954, 30% under the 1946 figure.

108. I. BERNSTEIN, *HOLLYWOOD AT THE CROSSROADS* 12 (Hollywood AFL Film Council Study 1957).

109. Between 1946 and 1956, when the American population was sharply rising from 141 million to 167 million, the total movie-going audience fell by one-half, from an average weekly attendance of 90 million persons in 1946 to 46.5 million persons in 1956. Of that latter figure, fewer than 12 million persons attended conventional four-wall theatres, while the balance went to drive-in theatres and on the average paid less per person. *Id.* at 2.

Not only was the moviegoing audience shrinking. So, too, was the production of American films.¹¹⁰ A 1957 study painted a bleak picture of the industry, and detailed the damage to its business structure in the decade following World War II, caused by adverse antitrust decrees; by the emergence of the independent producer; the breakdown of term contracts between the major studios and their actors, producers, directors and writers; the shrinking number of movie stars and the higher prices that had to be paid for them; the business diversification that characterized many of the major producers (investment, ownership of foreign theatres, oil and gas, real estate); the production of high-cost films; and the cost of new techniques of exhibiting motion pictures such as three-dimensional effects, wide screen, and improved sound.¹¹¹

Not surprisingly, the drop in theatre attendance and motion picture production was mirrored in a worsening of the economic status of persons employed in the studios. Studio employment fell from 22,000 in 1946 to 13,000 in the mid-1950s, with the major studios being the hardest hit. The increasing activity at the motion picture studios in the production of films for television provided only slight stability.¹¹² The earnings of motion picture employees rose only sixty-six percent between 1946 and 1956, while Los Angeles workers in manufacturing, for example, saw their wages rise seventy-six percent, and those in retail trade enjoyed an increase of eighty-two percent.¹¹³ While the payroll of all employers across the nation was increasing 103 percent in that decade, the total Hollywood payroll was shrinking by twenty percent. A major factor in this downslide was the substantial increase in the number of American films produced abroad.¹¹⁴

Behind all of these grim Hollywood statistics lay television. More Americans spent leisure time at home, where live entertainment and films were available for "free." Americans spent thirty-five percent more for recreation in 1955 than in 1946. In that period, spending for motion picture theatres dropped roughly thirty percent; spending for live entertainment such as legitimate theatre and opera rose roughly ten percent; and spending for radios, television receivers, recordings and musical instruments nearly doubled.¹¹⁵

All of these developments in the entertainment industries can perhaps best be summarized by considering their impact upon the income of professional musicians working in Los Angeles.¹¹⁶ In the five years under

110. *Id.* at 8.

111. *Id.* at 19-29.

112. *Id.* at 36 ("Even with this booster, however, the motion picture companies needed fewer than three workers for each five they employed in 1946. By contrast, the whole U.S. economy now employs six workers for each five needed.")

113. *Id.* at 42.

114. *Id.* at 65-70. Film production abroad offered lower wages, lower taxes, and readier availability of money and subsidies. *Id.*

115. Facts Consolidated, Trends in Imports of Sound Recordings (Aug. 1958) (prepared for Cecil F. Read).

116. *Trust Fund Hearings*, *supra* note 100, at 53-54 (tables of earnings). In spite of the competition from television, jukeboxes and wired-music services, their income from live per-

discussion, these members of Local 47 witnessed a substantial percentage increase in their total earnings from live face-to-face performances in nightclubs and the like, and from live television and television films; a modest increase in their total earnings from phonograph records and theatrical motion pictures; and a precipitous decline in their earnings from live and transcribed radio performances. Overall, these musicians were increasingly concerned about their economic situation. Scale wages for phonograph records were the same in 1954 as in 1946; Hollywood production of theatrical motion pictures was sharply declining; serious doubt existed as to the future of the musician in all forms of radio work; and, although television work, both live and on film, was on the upswing, there was concern that an undue number of work opportunities were being sacrificed by the use of canned and foreign music on television film. Certain actions taken by President Petrillo and the International Executive Board of the AFM in 1954 and 1955 brought matters to a head, and triggered a revolt within the membership of Local 47.

VI. THE TRUST FUNDS IN 1954-1955, AND THE APPEAL OF LOCAL 47

Although the Hollywood musicians perceived their economic situation to be gradually worsening throughout the late 1940s and early 1950s, their overt resistance to the Trust Fund policies was triggered by two decisions made by President Petrillo and the International Executive Board in 1954 and 1955. One decision, made in negotiations with the phonograph record industry, resulted in the perceived diversion of a long-overdue wage scale increase from the recording musicians to the Music Performance Trust Fund. The second decision, made in June 1955 during the term of the agreement with the motion picture industry, resulted in the diversion of rescoring fees, which were payable upon the release of theatrical motion pictures of television, from the film musicians to the Music Performance Trust Fund.

The wage scale for a three-hour recording session for phonograph rec-

formances in nightclubs, ballrooms and the like rose from a total of \$4.9 million in 1950 to \$7.7 million in 1954. Their income from work in television films also rose in that period, from \$455,000 in 1951 to \$1,129,000 in 1954. Interestingly, in 1952, the "re-scoring fees" to Local 47 members from the release of theatrical motion pictures to television was \$200,000, while their income from recording for one-half hour filmed television programs was not much more, \$284,000. The gap widened substantially in the years immediately following. The income of the Los Angeles musicians from live television between 1951 and 1954 rose from \$547,000 to \$1,873,000; their income as staff musicians on local television stations dwindled to almost nothing, while casual employment on local television remained relatively stable, and their income more than doubled from work on commercial programs broadcast on the networks. Earnings from work in radio were seriously diminished, falling from some \$3,210,000 in 1950 to some \$1,200,000 in 1954. While their earnings from employment by radio stations fell only some 15%, their earnings from commercial employment by sponsors or advertising agencies for radio network broadcasts fell by a factor of three, from \$2.6 million in 1951 to \$860,000 in 1954. Somewhat surprisingly, in light of the shrinkage of production of theatrical motion pictures in Hollywood, the earnings of Local 47 members in motion pictures increased slightly between 1950 and 1954, from \$4.4 million to \$5 million.

ord musicians were set at \$41.25 by the labor agreement of 1946 between the AFM and the record manufacturers. At the end of the yearlong strike of 1948, a new agreement was reached in which the Recording and Transcription Fund was transmuted into the Music Performance Trust Fund, in order to comply with the Taft-Hartley Act. That agreement made no provision for an increase in scale wages for the recording musicians over its five-year duration. During the negotiations for a new agreement, in December 1953, Petrillo sought both a substantial pay increase for the recording musicians and an increase in the contributions to be paid to the Trust Fund upon the sale of phonograph records (then at an average level of one percent of the retail sales price). The recording companies adamantly resisted an increase in their royalty obligations to the Trust Fund. The companies were already paying some \$1.5 million per year into the Fund, and they believed that any increased payments by the record companies should be paid to the recording musicians, as an incentive and reward to boost morale. The companies appreciated that for every dollar diverted into the Trust Fund, there would be one dollar less to pay the musicians who made the records.

A tentative agreement was reached in early January 1954, by which the Trust Fund payments were to be increased by seven and one-half percent for 1954 and 1955, and by another seven and one-half percent of the original royalty figures for 1956 through 1958. In addition, the agreement increased scale pay for the recording musicians by ten percent for the first two years of the contract and another ten percent over the next three years, resulting in a pay scale for 1956 through 1958 twenty-one percent higher than the pre-contract scale.

After the recording companies had thus expressed a willingness to pay these percentage increases to the recording musicians, Petrillo in January declared to the companies that they should have no interest in whether those increases were paid to the musicians or were instead paid to the Trust Fund, over and above the percentage increases in the sales royalties already payable to the Fund. Although the companies initially demurred, the course of negotiations was such that they did not care to press the issue; the memories of the 1948 strike, and no doubt also of the two-year strike five years before that, were still fresh. The Labor Agreement that was finally executed in January 1954 provided for the continuation throughout its five-year term of the \$41.25 wage scale for a three-hour recording session. The agreement also provided for the payment of ten percent of the musicians' scale earnings during the first two years, and twenty-one percent of scale earnings during the next three years, to the Music Performance Trust Fund. The separate 1954 Trust Fund Agreement provided in addition for two increases of seven and one-half percent over the prior prevailing royalty rate calculated on the number of records sold.

This version of the 1953-54 record negotiations was related some three

years after the event by James B. Conkling, in a court deposition.¹¹⁷ At the time of the negotiations, Mr. Conkling was President of Columbia Records and represented that company in negotiating the 1954 Labor Trust Agreements. His account was sharply contradicted by President Petrillo and by the International Executive Board. They consistently asserted that the ten and twenty-one percent payments were never intended as wage-increase payments for the recording musicians. Interestingly, the individual contracts of employment between the recording companies and their recording artists, which generally provided for certain payments to the artists as an advance against any future royalties they might receive on record sales, treated the ten and twenty-one percent payments as payments to the recording musicians themselves but the seven and one-half percent increase in royalties payable to the Trust was not so treated.

In any event, word of the negotiations for the 1954 phonograph record agreements reached the recording musicians of Local 47, who were angered not only by the union's failure to secure any scale increase—making their scale earnings throughout 1958 the same as in 1946—but also by the perceived diversion to the Trust Fund of wage increases already conceded by the recording companies. Initially, royalty payments to the Trust Fund had been rationalized as a tax upon the record producers to ease unemployment generated by the recording business. Now the recording musicians could fairly characterize the Trust Fund payments as a diversion of long overdue pay increases from them, the creative and working artists, to musicians the bulk of whom were not working in the industry, or were not union members, or were relying on Trust Fund payments merely as a modest supplement to a principal source of income from some other trade.

The Los Angeles musicians performed on roughly one-third of the phonograph records made in America, while nearly all of the theatrical motion pictures made in the 1940s and before utilized the services of Local 47 members. When the AFM in 1951 relaxed the five-year ban upon the release of theatrical motion pictures to television, Hollywood musicians were the beneficiaries of the new re-scoring policy, which conditioned such release upon the making of a new soundtrack. When this proved impracticable, the Hollywood Film-Television Labor Agreements of 1952 and 1954 provided instead for the television use of theatrical films upon the payment of re-scoring or re-use fees to the musicians who performed on the original soundtrack of the films; the re-scoring fee was \$25 for each instrumental musician, or one-half the prevailing scale for recording on television film.

The separate Hollywood Film-Television Trust Agreements of 1952 and 1954 provided for the payment by the signatory motion picture companies of five percent of the gross revenues they received, both when the film was released to television and so long as the film continued to be used on television. Thousands of theatrical motion pictures were released to television between 1951 and 1955 as an antidote for the sharp decline in box office

117. Deposition of James B. Conkling in *Anderson v. American Fed'n of Musicians*, No. 669,990 (Cal. Super. Ct., L.A. County), *passim*.

receipts and corporate profits in the motion picture industry. These transactions generated nearly \$800,000 in re-scoring fees, payable initially to the musicians recording the "new" soundtrack (more accurately, "dummy track") and thereafter to the musicians who worked on the original film.

In June 1955, in the middle of the term of the 1954 Labor Agreement and Trust Agreement with the motion picture producers, Petrillo and the International Executive Board declared that the producers were to cease making re-scoring payments to the film musicians and to begin making them instead to the Music Performance Trust Fund, in addition to the payment of five percent of their gross revenues. At its meeting in Cleveland, in connection with the 1955 Annual Convention, the International Executive Board resolved:

In many cases the musicians who made the original pictures have passed away or cannot be located. It is on motion made and passed that any future such repayments be made to the Music Performance Trust Fund instead of to the musicians originally employed. This is effective immediately. In case this action requires a change in the contract, the matter is to be left in the hands of the President.¹¹⁸

Petrillo promptly took appropriate action by informing the motion picture companies of this change; the Federation's constitution and bylaws empowered him to take such unilateral action without consultation with or approval by the affected parties.

Petrillo asserted that, because of the death or unknown location of most of the musicians employed in films in the 1930s and 1940s, by 1955 only some one hundred musicians were receiving re-scoring fees under the 1954 Labor Agreement. Petrillo characterized this situation as a "racket"¹¹⁹ and stated that it was a "mistake" for the union ever to have entered into a labor agreement that provided for the payment of re-scoring fees to the film musicians.¹²⁰

The musicians of Local 47, however, viewed the June 1955 directive of the President and the IEB as an unjustified diversion of moneys from older film musicians, many of whom were now unemployed and in need of the re-scoring payments, to other musicians across the country who had not given of their creative endeavors to the motion picture industry and who might not even be members of the union. They were particularly outraged by the recapture of some checks that had already been made out to the

118. INT'L MUSICIAN, Aug. 1955, at 48-49.

119. Deposition of James C. Petrillo, *supra* note 98, at 74, 114. Petrillo felt that the film musicians had very few equities in the matter.

Musicians who originally made the picture received the union scale. They didn't make the picture without pay, and we thought if we took the money and put it in a Trust Fund it will do more good for 260,000 musicians than a handful of musicians. . . . In the labor movement you deal with majority membership; what is best for the majority, not the individual. . . . The group that we are conducting the negotiations for is part of the American Federation of Musicians. . . . Always we work for the interest of the majority of the members of the Federation.

Id. at 114, 118.

120. *Id.* at 71-72.

account of the film musicians and that were then re-issued to the Trust Fund. Their distress mounted when they learned that within the first year after the Federation's decision of June 1955 it was estimated that because of the very large television deals made by a number of major motion picture producers, more than \$2.5 million would be paid into the Trust Fund rather than to the Hollywood musicians.¹²¹ Thus the diversion of wage increase payments in the 1954 phonograph record industry agreements and the diversion of re-scoring fees in June 1955 contributed to a growing conflict between the Trust Fund policies of the AFM and the interests of the film and phonograph recording musicians.¹²²

The board of directors of Local 47 at its meeting in July 1955 authorized the recording secretary of the local, Maury Paul, to draft a letter to the International Executive Board protesting its action of the previous month. The letter pointed out that many of the studio musicians receiving the rescoring or reuse payments were in serious need and that many of the film musicians had relied on the Federation's prevailing practice of securing payments for musicians upon the transfer of their work from one medium to another. Secretary Paul concluded with an endorsement of the trust fund principle, but stated that industry payments, not payments by members of the Federation, should support the fund. He suggested that the earnings of all musicians throughout the country could be taxed to ease the problems of musicians displaced by recording technology. In response to Paul's letter, the International Executive Board stated that it was prepared to reconsider its action at its midwinter meeting in January 1956.

Local 47 did not wait for the IEB's January meeting. At the general membership meeting of Local 47 in September 1955 the members, more than 500 in number, voted unanimously to pursue a formal appeal to the International Executive Board for relief and to appoint a member of the local's board of directors, Cecil F. Read, to represent the local in its ap-

121. Warner Brothers alone had sold some 1,000 films for use in television. *Trust Fund Hearings*, *supra* note 100, at 17.

122. Both of these decisions by the AFM officers were later to be explained in a deposition by President Petrillo, under sharp questioning by opposing counsel.

- Q. Have you personally favored the establishment of performers' rights, . . . either in the Federation or elsewhere?
- A. Well, performance rights is all right if a performer can get his rights, but my idea as a labor leader is always trying to get some employment for the fellow that is out of work. . . . The guy that I want to help is the fellow that is going out of business.
- Q. You don't have any interest in securing additional benefits for the man who is making the recording, who is doing the work?
- A. Well, the fact is, I guess, his is the highest wage scale in the country. How can you say we are not doing anything for them? The best conditions, the best wage scale is the recording musician. What are we supposed to do, get them some more money, some more conditions, residual rights? What about the guy that is out of work here? Aren't you thinking about him at all, this fellow that has been put out of work? . . . You are for the guy that is making the dough, and I am for the guy that is out of work; that is the difference between the two of us.

Deposition of James C. Petrillo, *supra* note 98, at 67-69.

peal.¹²³ The resolution directed the officers and employees of the local to furnish Read with all of the documents needed in preparation for the appeal. When the vice-president of the local, who was also an IEB representative, promptly resigned to avoid turning over documents, Read ran for the position, against a member who was supported by the officers and employees of Local 47, and was elected in October 1955 by a vote of approximately 1,300 to 500. Petrillo had granted the request of Local 47 for a hearing before the International Executive Board but withdrew his authorization when Read was elected vice-president of Local 47. The local reinstated its petition, however, and Petrillo relented. Nevertheless, Read's requests for information and documents from Federation officers and from the Trustee of the Music Performance Trust Funds were for the most part denied.

In January 1956, Read presented the local's formal Appeal to the International Executive Board.¹²⁴ The basic argument of Local 47 was that the Trust Fund policies of the Federation had resulted in a severe impairment of the economic position of the recording musicians, and that the union had thereby violated its fiduciary obligation as bargaining representative of those musicians and had deprived them of their property rights. The appeal began by pointing out the economic plight of the recording musicians.¹²⁵ The Appeal of Local 47 then proceeded to describe the Trust Fund policies of the Federation and their harmful impact on the film and recording musicians. Payments were made to the Trust Funds, rather than

123. Read had "worked in Chicago in theaters before there were sound movies, then in radio stations before there was an NBC or CBS network, and in hotels and dance halls before live musicians were displaced by juke boxes and wired musical services." *Hearings on Performance Rights in Sound Recordings, Copyright Office* (July 28, 1977), reprinted in SUBCOMM. ON COURTS, CIVIL LIBERTIES, AND ADMINISTRATION OF JUSTICE OF HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., PERFORMANCE RIGHTS IN SOUND RECORDINGS 969, 1000 (Comm. Print 1978). In 1947, he moved to Los Angeles, where he worked on network radio programs, phonograph records, videotape and film television programs, and motion pictures. Read was vigorous, articulate, meticulous with facts and figures, and passionate in his concern for the plight of the recording and film musicians.

124. The full text of the appeal is set forth in the *Trust Fund Hearings*, *supra* note 100, at 57-93.

125. *Id.* at 60-70. While per capital income in the United States had risen 229% from 1939 to 1955, and the cost of living had risen 91%, the wage rates for musicians in phonograph recording had increased only 37%, and the wage rates for musicians in theatrical films increased only 61%. *Id.* at 61. In that same period, the hourly rates negotiated by the American Federation of Television and Radio Artists (AFTRA) for singers had increased 80%, the hourly rates for singers represented by the Screen Actors Guild (for vocal performances in motion pictures) had increased 250%, and the hourly rates negotiated by the Screen writers guild had increased 133%. *Id.* at 68. This differential was compounded by the fact that it was common practice among unions representing other creative artists involved in film or recordings to negotiate for royalty payments to the performers upon re-use in the same medium or upon transfer to a different medium. For example, actors represented by the Screen Actors Guild were paid royalties when their theatrical films were exhibited on television, when their television films were exhibited in theatres, and when their television films were shown more than once on television. Performers represented by AFTRA were paid for re-use of kinescope television shows and transcribed radio shows, and when motion picture soundtrack was transferred onto phonograph records or phonograph records were dubbed onto television film. *Id.* at 67. In the musicians' case, most of these re-use payments were made instead to the Musicians Performance Trust Fund. *Id.* at 66.

the musicians, when phonograph recordings were sold, when electrical transcriptions were replayed on radio, when theatrical motion pictures were released to and exhibited on television, when television films were re-used and when commercial announcements were re-broadcast. Wage increases negotiated for musicians performing on phonograph records were paid instead to the MPTF. Trust Fund payments for the re-use of television films made it prohibitive to use live American musicians and induced producers to use foreign or canned music instead. In the half year since June 1955, the release to television of more than 1,000 theatrical motion pictures was alleged to have resulted in the diversion of nearly \$1.6 million of re-scoring fees from the Los Angeles musicians to the Trust Fund, with a correlative loss to Local 47 of nearly \$24,000 in union dues.

The local's Appeal emphasized the fact that its membership was so small in proportion to the total membership of the AFM that it was unable to protect its interests within the governing organs of the Federation and argued that the burden of protection thus fell on the Federation leaders. Recording musicians, most of whom worked in Los Angeles or New York, constituted no more than three percent of the Federation membership.¹²⁶ The Los Angeles musicians accounted for ninety-seven percent of all recording for motion pictures, ninety-four percent of television film recording done by American musicians, and thirty-three percent of all phonograph recordings. Their services generated roughly half of the payments going into the Trust Funds, yet they received only some four percent of the moneys paid out by the Trust Funds.

Because of its limited voting power within the Federation, Local 47 claimed in its Appeal that "an extremely high degree of responsibility and trust rests with the governing body of the Federation to respect and safeguard the interests of this important but impotent minority in the conduct of affairs affecting film and recordings."¹²⁷ Local 47 claimed that because the Federation was acting as a bargaining agent and fiduciary, all negotiated payments rightfully belonged to the performing musicians.¹²⁸ The Appeal also presented the theory that a performer has a basic property right in his performance and in any reproduction thereof. This right was

126. *Id.* at 90-93. Of the national union's membership of 250,000 persons, roughly 50% allegedly did no work at all, and only an estimated 20% were employed fulltime, earning \$3,000 or more per year from performing. Of the roughly 53,000 fulltime musicians, some 41,000 were engaged in live performances in clubs, bars, hotels, restaurants, and the like. Only some 12,000 were employed in radio, television, movies and the recording industries. *Id.* at 91.

127. *Id.* at 64.

128. *Id.* at 65, 69.

In the discharge of its responsibilities as agent, the union has a fiduciary relationship to those it represents akin to that of a trustee, and must govern itself with respect to their interests accordingly.

By membership in the union, the musician does not relinquish his individual rights in his performance . . . ; nor does the federation acquire any authority to prejudice, diminish or transfer those rights, or the fruits thereof.

Id. at 69.

also labelled a "performance right," justifying compensation for the musician (or any other creative performer, such as an actor or singer) whenever his recorded work—on records, tape, soundtrack or film—is commercially exploited. The right was viewed as fully comparable to the right of an author upon the printing of copies of his book, or to the right of a composer upon the public performance of his music.¹²⁹

The Appeal closed with a detailed request for relief. It petitioned the International Executive Board of the AFM to grant the following benefits: (1) The payment of increases in the recording industry wage scale, now twenty-one percent, to the recording musician instead of the Trust Fund; (2) The payment of rescoring fees of \$25 to musicians recording the soundtrack of a theatrical motion picture upon release of the motion picture to television, and the recovery from the Trust Fund of all such fees paid since June 1955; (3) The payment of re-use fees for transcribed radio shows to the recording musician rather than to the Trust Fund; (4) The payment of royalties for re-runs of films made for television not to the Trust Fund but to the recording musicians; (5) The reduction in the total cost of recording music for television films, in order to recoup losses from the use of imported or library soundtrack; (6) The explicit adoption by the Federation of the principle of performance rights, and the making of a concerted effort (with actors, singers, writers, directors and other performing artists) to change the copyright law to recognize such performance rights.¹³⁰

The International Executive Board denied the Appeal on February 16, 1956, stating that the ten and twenty-one percent scale payments under the phonograph record industry agreement were not wage increases but rather were contributions to the Trust Fund.¹³¹ The Board claimed that the objective of Local 47 was the discontinuance of the Trust Funds, and that "[t]his would mean that many musicians throughout the country would be deprived of the little employment made possible by the Fund and for which the recording industry acknowledges it owes an obligation. The only ones to benefit would be the recording musicians who are among the best paid members of the Federation and whose mechanical product is the principal reason for the widespread unemployment among our other members."

VII. THE REVOLT WITHIN LOCAL 47

At the same time as Local 47 was on record as attacking the Federation's Trust Fund policies, the president of the local was going on record to defend them. John te Groen had been president of Local 47 since 1950. In that capacity he attended in late 1955 a meeting of delegates from California, Arizona and Nevada, at which a resolution was adopted that reflected the "grass roots" support of union members for the Music Performance Trust Funds. Te Groen joined in a unanimous resolution "[t]hat this con-

129. *Id.* at 69, 88.

130. *Id.* at 69-70, 89-90.

131. INT'L MUSICIAN, Mar. 1956, at 12.

ference go on record as vigorously opposing any movement which has for its purpose the weakening or destruction of these funds, and further, that it affirms its support of President Petrillo in his efforts to protect the interests of the great membership of our federation."¹³²

After the International Executive Board rejected the Appeal of Local 47, Cecil Read consulted an attorney for advice as to the best way to pursue the interests of the local given the indifference of the Federation leadership and the local's president. Read's attorney advised him that a lawsuit would involve a protracted battle; he also mentioned the unlikelihood of success of a challenge through the National Labor Relations Board by any newly formed independent union seeking to represent the Los Angeles musicians in separate collective bargaining negotiations.

In anticipation of the regular membership meeting of Local 47 on February 27, 1956, Read and several of his supporters precipitated a "secret" meeting that morning at Larchmont Hall in Los Angeles, at which some 100 invitees were present. Read and his associates, informally known as the steering committee, devised a plan for the conduct of the afternoon general membership meeting, the principal elements of which were the creation of a Musicians' Defense Fund, which would take any legal action necessary to assert the positions articulated in the earlier Appeal to the IEB and be financed by voluntary contributions from the membership, and the taking of appropriate action, including ouster, of any officers of Local 47 who remained loyal to the position of Petrillo and the IEB. Unknown to the participants in the "caucus" meeting on the morning of February 27 in Larchmont Hall, their words were recorded; the owner of the hall had called a business representative of Local 47 and had gotten his approval for the secret tape-recording of the meeting.

The regular membership meeting of Local 47 was held that afternoon, with at least 2,000 members (out of a total membership in the local of some 16,000) in attendance. The meeting was chaired by President te Groen. The principal item on the agenda was Cecil Read's report on the fate of the local's Appeal to the International Executive Board. After so reporting, Read announced that any further attempt by the local to redress its felt wrongs within the Federation would be futile, and he introduced two resolutions, one authorizing further action including litigation to protect the rights of the members, and another authorizing the creation of a music defense fund. It became quite clear that the litigation contemplated by Read and his supporters was not merely an attack on the Trust Funds but also an attack upon the Federation as representative of the recording musicians, through a National Labor Relations Board election. President te Groen spoke against the resolutions, warning that their adoption could lead to the revocation of the local's charter from the Federation, and ruled consideration of the resolutions out of order, on the ground that proper notice of their introduction had not been given to members of the local in

132. *Trust Fund Hearings*, *supra* note 100, at 129.

the formal call for the meeting. One of Read's associates appealed the ruling to the membership, which overruled it and adopted the resolutions.

This tactic had been planned by the Read faction during the morning meeting at Larchmont Hall, as had the next step—the introduction of a demand for the resignation of President te Groen, along with Financial Secretary Hennon and Recording Secretary Paul, and then the introduction by Cecil Read of a resolution that these three local officers be suspended from office. Further heated discussions resulted in a substitute motion by Read calling for the temporary suspension of te Groen; te Groen earlier that evening had privately stated to Read that he would abide by the instructions of the Federation and of Petrillo even if those instructions were to conflict with the policies of Local 47. Te Groen ruled Read's motion out of order, but Read appealed the ruling of the chair. The meeting fell into a state of turmoil; Read put to a voice vote the overruling and suspending of te Groen, and ruled that both votes had carried. The meeting concluded with an appeal by the Read supporters for contributions to the Musicians' Defense Fund.

The next day, February 28, the local's board of directors held its regular meeting, with Vice President Read—taking over the duties of the president—in the chair. The board adopted a motion to file formal charges against te Groen and secretaries Paul and Hennon, and to call a special meeting of the local membership to consider such charges.

On March 1, the Local 47 board of directors met again. Te Groen was present and declared that he had not been legally removed from office. Moreover, he adverted to a telegram sent that day by President Petrillo to each member of the local's board of directors. The telegram stated that te Groen had filed with the International Executive Board an appeal from the action of the February 27 meeting of the local suspending him from office and that all actions taken at meetings not chaired by te Groen were stayed pending disposition of the appeal. Read declared that Petrillo's order was invalid, but when te Groen and Hennon left the room the Board's quorum was destroyed and the meeting was adjourned. Four days later, Read and his supporters circulated among the local membership a call for a special meeting at midnight on March 12 to consider charges against te Groen and to request his removal from office. In the meantime, the International Executive Board had established a committee of five of its members to investigate the claim of te Groen that the February 27 meeting had been improperly packed and organized and that his suspension was unauthorized. That investigating committee wrote to Local 47 directing that the charges against te Groen looking toward his removal from office not be pressed while the investigation was going on, and directing that the membership meeting called for March 12 be cancelled by order of the IEB. At a meeting of the local's board of directors on March 9, the directors adopted a motion introduced by Read, declaring that the IEB had no authority to call off the March 12 meeting. The March 12 midnight meeting was in fact held, and very well attended. Because te Groen was not present, Read felt

it appropriate to say some words in his defense. Then, by secret ballot, the membership voted, 1,535 to 51, to remove John te Groen from the presidency of the local. Promptly after the meeting, te Groen filed an appeal to the IEB from the action of the meeting removing him from office, and President Petrillo directed that pending the appeal the removal from office would be stayed and te Groen was to remain as president of Local 47 and chairman of its board of directors.

Another confrontation was assured when at a later meeting of the local membership, some 1,800 members heard the reading of charges prepared by Read against local secretaries Hennon and Paul. Some 1,500 voted by secret ballot to remove them from office, but Petrillo promptly overrode that action and ordered them reinstated.

Shortly after the March 12 meeting te Groen and Hennon filed charges with the International Executive Board against Cecil Read and twelve others. The formal charges stated that the "defendants" had obstructed the operations of the local by conspiring to oust its regularly elected officers; that they had packed the meeting of February 27 and effected an invalid suspension of the local president; that they met as the purported board of directors of the local on March 1, contrary to the orders of President te Groen; that they improperly called the meeting of March 12 and persisted in holding that meeting in defiance of the order of President Petrillo and the International Executive Board; that they invalidly attempted to oust te Groen from office at a meeting invalidly called; and that they openly invited the revocation of the local's charter. All of these allegations were said to demonstrate conduct—such as advocating dual unionism, defying orders of the Federation, and placing obstacles in the way of the successful maintenance of Local 47—that was properly the subject of discipline within the union. The charges against Read and his supporters concluded:

The charged member and each of them participated in the attempt to establish an organization which was intended and designed to wrest from AFM its exclusive right to represent and bargain for musicians employed in the motion picture, the recording and the broadcasting industries. The charged members and each of them have by act, deed and word of mouth, attempted to bring AFM into disrepute and to substitute for it a dual, rival and antagonistic bargaining agent.

All of the parties charged filed answers denying many of the allegations, denying the validity of certain of the Federation's bylaws and directives, and demanding a hearing with the right to confront and cross-examine witnesses before an impartial tribunal to be selected by the membership of Local 47. On March 28, the defendants were notified that a trial on the charges had been scheduled. The hearing, with the plaintiffs and defendants represented by attorneys, was conducted in Hollywood from April 9 to April 13, on most of these days in the evening as well as in the morning and afternoon. In addition to the testimony offered by witnesses, the tapes of the "caucus" of February 27 at Larchmont Hall were introduced in evidence and played. The Referee appointed by President Petrillo at the di-

rection of the International Executive Board to preside at the hearing was Arthur J. Goldberg, then special counsel to the AFL-CIO. Referee Goldberg rendered an exhaustive and detailed decision on May 4, 1956.¹³³

Referee Goldberg stated at the outset that his task was not to consider the merits of the position of Read and his supporters, but only to determine whether their actions were subject to discipline under the constitution and bylaws of the AFM or Local 47. He then proceeded to analyze some of the larger issues raised by the charges, stating that "almost every union at some stage must balance the interests of various groups among the employees whom it represents in determining the allocation of benefits that can be negotiated by the union," and that "[n]ecessarily, when such decisions are made, there may be those who feel that they have not received their proper share of the benefits negotiated by the union." While it would be a perversion of trade union principles to hold that complaints and efforts to change union policy should be the subject of discipline,

[j]ust as surely, every union, and indeed every organization, must insist upon compliance with the reasonable rules which govern its structure in the processing of these complaints, and in the pursuit of the efforts to change its policy. If the organization provides procedures by which the grievances of the individual group may be heard and considered, it is a fundamental obligation of the group to pursue those procedures in presenting their point of view. . . . There was available to the local, as there is in almost every union, the right to appeal [the action of the International Executive Board denying the local's Appeal against Trust Fund policies] to the ultimate governing body of the union—the Convention. This procedure the defendants did not utilize¹³⁴

The Referee concluded that the Federation could properly insist that the defendants utilize the procedures in the union constitution and bylaws and that they obey the union's rules and regulations.

Referee Goldberg then turned to the applicable rules of the AFM and held that it was reasonable for the Federation to provide in article 13, section 1 of its bylaws for the fine or expulsion of a member who "in any way places obstacles in the way of the successful maintenance of a local or violates any law, order or direction, resolution or rule of the Federation." Also appropriate, held Referee Goldberg, was the application of article 12, section 36 of the bylaws, which provided that "advocacy of dual unionism . . . shall constitute sufficient and proper grounds for expulsion."

The Referee then proceeded to consider each of the charges against each of the defendants. He found that six of the defendants, including Cecil Read, had participated in the ouster of te Groen on February 27, 1956, and that they thereby had violated the bylaws of Local 47, since the suspension from office was, pursuant to a plan made at a secret caucus, without prior notice, without charges, without a hearing, and without a secret ballot.

133. The full text of the Referee's decision is set forth in *INT'L MUSICIAN*, May 1956, at 9.

134. *Id.* at 39.

Goldberg also found that these defendants had violated the bylaws of the Federation, because the illegal ouster of elected officers surely "places obstacles in the way of the successful maintenance of a local." These six had engaged in a "deliberate and wilful conspiracy to suspend te Groen, not for any neglect of duty or other proper charge, but because he would not agree in advance to lead the local in defiance of the lawful regulations of the Federation."¹³⁵

Goldberg did not sustain the charge that certain of the parties violated Petrillo's telegraphed order setting aside te Groen's suspension from office, since the meeting of the local's board of directors at which these members were in attendance was adjourned for lack of a quorum. The Referee did sustain the charge, however, against eight persons, including Cecil Read, regarding the ignoring of the IEB's order to cancel the meeting of March 12 at which te Groen was purportedly voted out of office; these members of the local's board of directors had contravened the section of the Federation's bylaws making local bylaws subordinate to those of the Federation and another section outlawing the violation of a Federation order or directive. The defendants' refusal to cancel the March 12 meeting could not be justified simply by claiming that the IEB order was contrary to the "will of the membership" of the local; the order was within the power of the IEB, since it was confronted with a serious claim by President te Groen that the "will of the membership" was in this case in violation of the rights of individual members and of the union's orderly processes.

Referee Goldberg also sustained the charge against Read and one other person alleging that they openly invited the revocation of the charter of Local 47 by participating in all of the pertinent events, particularly the ouster of te Groen and the open defiance of the order of the IEB. These actions also constituted an obstruction of the successful maintenance of Local 47, in violation of the Federation's bylaws. As for several other defendants who participated in some but not all of the pertinent events, "while I am convinced that perhaps all of them also understood what they were doing, nevertheless, in keeping with my desire to grant to the defendants the benefit of any doubt, I am finding [them] not guilty of this charge [of inviting the loss of the local's charter]."¹³⁶

Cecil Read alone was held guilty of the charge of advocacy of dual unionism, "one of the most serious charges that can be leveled against a trade unionist." According to Goldberg, Read

left no doubt, in his remarks, that the course of action which he planned and advocated involved the creation of a separate bargaining unit for Local 47 outside of the Federation and in opposition to it, and an election campaign to certify the local instead of the Federation under the National Labor Relations Act.¹³⁷

The other defendants were held not guilty, in view of the serious nature of

135. *Id.* at 41.

136. *Id.* at 43.

137. *Id.*

the charge, the doubt whether these defendants fully understood the implications of Read's plans and actions, and the Referee's desire to accord the defendants the benefit of any doubts.

Finally, Read and five other defendants were held guilty—by virtue of their conspiring at the Larchmont Hall caucus to precipitate the summary and illegal ouster of unprepared and unwarned officers of the local—of placing obstacles in the way of the successful maintenance of the union. Several other charges were dismissed as overbroad, unsupported or duplicative.

Referee Goldberg was as discriminating and lenient in recommending sanctions as he had been in ruling upon the substance of the charges. Goldberg recommended that a party technically guilty of one charge not incur any penalty at all, and that ten other persons, not including Cecil Read, be expelled from membership in the AFM and in Local 47 but that they be reinstated after one day on the condition that they refrain thereafter from advocating dual unionism, placing obstacles in the way of Local 47, and violating any order, direction, or rule of the Federation. If these persons abided by that condition for one year they were to be deemed to have fully satisfied their penalty, except that they could not hold office in Local 47 for a period of two years after their reinstatement. The recommended sanction for Cecil Read was the most severe: expulsion from membership in the Federation and Local 47 for one year, with readmission to be granted on application thereafter, provided that during the period of expulsion he engaged in no advocacy of dual unionism against the Federation, placed no further obstacles in the way of the successful maintenance of Local 47, and violated no order, direction or rule of the Federation. Read too was to be debarred from holding office in Local 47 for two years following reinstatement.

Within three weeks of the issuance of the Goldberg recommendations, the International Executive Board met and, on May 23, 1956, adopted his findings and recommendations with immaterial variations. At the same meeting the International Executive Board sustained the appeals of John te Groen and Maury Paul from their ouster as president and secretary, respectively, of Local 47.

The matter did not end there, however, for all of the defendants were granted an opportunity to present their case to the full membership of the Federation at the June 1956 Annual Convention in Atlantic City, New Jersey. At the Convention President Petrillo turned over the chair to one of the delegates, who urged that the appellants be given every consideration. Read and seven other persons individually stated their arguments,¹³⁸ and Petrillo then spoke in reply, reviewing the Trust Fund policies of the Federation and giving the reasons behind the action of the International Executive Board in expelling the appellants. Among other things, his speech referred to the well-paid Hollywood musicians who were attempt-

138. *Id.*, Aug. 1956, at 28.

ing to take the bread from the tables of the delegates. After a standing ovation, several members of the Executive Board made brief statements in support of their decision to expel.¹³⁹

A motion was made and seconded to sustain in full the action of the International Executive Board. Ironically, Maury Paul, the secretary of Local 47, then rose according to the instructions of the local and read a resolution urging that the expulsion of the appellants be reversed. The resolution asserted that all of the appellants had been expelled for actions taken on behalf of Local 47 pursuant to membership resolutions and petitions; and that their expulsion from union membership was "unjust and inequitable." The resolution required the Local 47 delegates to vote for a reversal of the expulsions. A vote was then taken to sustain the expulsions; the motion passed unanimously. Petrillo publicly criticized te Groen and Paul for seeking to overturn the expulsions, but they gave public assurance that they personally supported the action of the International Executive Board but were forced to cast their votes against it by virtue of the instructions imposed by the membership of Local 47.

In spite of the fact that Read and his closest supporters had been ousted from membership in the Federation and Local 47, the members of that local still actively supported the principles for which Read had fought. This was evidenced on the following day at the Convention, which opened with a long series of resolutions on behalf of Local 47, proffered in each instance by President te Groen on instructions of the local membership. The resolutions included proposals giving greater authority to the local membership, deleting certain powers of the President and the Executive Board, reinstating certain re-scoring and re-use payments and rights, and providing for wage increases.¹⁴⁰

Upon the recommendation of the Federation committee initially charged with considering these resolutions, the Convention voted them down. It did, however, support a lengthy resolution, introduced on the following day, that affirmed the policy of the Federation leadership with regard to the Music Performance Trust Funds and the "fight against un-

139. The tape recording of the Larchmont Hall meeting was also played.

140. Specifically, the resolutions called for ratification by the membership of all collective bargaining agreements; the deletion from the Federation bylaws of article 1, section 1, giving the President the power to annul provisions of the constitution and bylaws; abandonment of the policy of requiring payments to the Music Performance Trust Funds in the motion picture, television, phonograph recording and transcription industries; the reinstatement of the policy of requiring re-scoring payments to film musicians when theatrical motion pictures are released to television; the endorsement by the Federation in contract, legislation and treaties of residual and re-use performance rights; the negotiation for wage increases in the phonograph record industry commensurate with the increase in the cost of living since 1946; the deletion of the powers of the Executive Board to annul actions of the Convention and to expel any local from the Federation; the granting to larger locals of votes at the Convention commensurate with the size of their membership, not subject to the present maximum of 10 votes; the deletion of the President's power to remove a local officer without due process; amendment of the Federation bylaws to provide for appeals to the Convention on decisions other than fines and expulsions; and payment to musicians for re-use of certain radio transcriptions rather than payment to the Trust Fund.

employment," applauded the effort and "persuasive talent" of President Petrillo on this matter, and criticized the "uninformed, misled, and dissident group of musicians" responsible for unwarranted attacks upon the Trust Fund policies of the Federation.¹⁴¹ During the period of the Convention, the International Executive Board also approved a resolution empowering the Board to place a local union under the control of a trustee appointed by the President of the Federation in the event the Board had reason to believe that the union, its officers or members were violating the Federation constitution or bylaws, or were acting in a manner detrimental to the welfare or interests of the Federation or of the local, thus warranting emergency action.¹⁴²

By the close of the 1956 Convention, the Read faction and the membership of Local 47 had been rebuffed by the full membership of the Federation. The leaders of the rebel faction had been expelled, the challenges of Local 47 to the Trust Fund policies had been rejected, and the International Executive Board had been given express power to place a renegade local under trusteeship. There were no further intra-union forums to which the recording and film musicians could take their case. This outcome did not, however, take Read by surprise. He had already appeared before a legislative subcommittee in the House of Representatives of the United States Congress, and he was about to spearhead four massive lawsuits, one directed against each of the Music Performance Trust Funds, in the courts of California.

VIII. THE TRUST FUND HEARINGS OF 1956

On May 10, 1956—less than one week after the filing of the recommendations of Referee Goldberg—the Chairman of the Committee on Education and Labor of the United States House of Representatives appointed a special subcommittee to investigate the operations of the Music Performance Trust Funds. The chairman of the subcommittee was Phil M. Landrum of Georgia, and the other two members were James Roosevelt and Joe Holt, Representatives from Los Angeles. The subcommittee traveled to Los Angeles to take testimony on May 21 and 22 from the Hollywood musicians who were most adversely affected by the Federation's Trust Fund policies, as well as those who were the principal characters in the struggle for power within Local 47.¹⁴³ Extended testimony was given by Cecil Read, who also introduced into evidence the entire text of the Appeal of Local 47 that he had presented to the International Executive Board of the Federation in January 1956. Testimony was also given by John te Groen, and other persons in the Hollywood music industry, including bandleader Bob Crosby and television producer and actor Ozzie Nelson.

In general, the witnesses' testimony emphasized two perceived abuses:

141. INT'L MUSICIAN, Sept. 1956, at 18-19.

142. *Id.*, July 1956, at 6 (emergency action therefore warranted).

143. See *Trust Fund Hearings*, *supra* note 100.

the diversion of compensation from recording musicians to the Trust Funds, and the undemocratic structure and procedures of the American Federation of Musicians. Ironically, both Read and Te Groen articulated their shared view that the diversion of the \$25 re-scoring fees, upon the release to television of theatrical motion pictures, from the original recording musicians to the Musicians Performance Trust Fund, was grievously unfair and objectionable to the Hollywood musicians. Te Groen observed that, as president of Local 47, he had promptly challenged this June 1955 action of the International Executive Board by a letter to the Board, and that he intended to raise the challenge again at the forthcoming 1956 Annual Convention. Read also presented detailed information regarding the diversion to the Trust Funds of imminent wage increases in the phonograph recording industry and of re-use payments for transcribed radio programs; and regarding the severe impact of substantial Trust Fund payments upon the employment of live musicians in television film. Read made it clear that he had no objection to the Trust Funds in principal, or even to an exaction from the earnings of all musicians for the purpose of alleviating unemployment. His objection was rather to the diversion of wage increases to the Trust Funds; the massive disproportion between the moneys contributed to the Trust Funds through the services of Local 47 and the moneys that Local 47 musicians received from the Funds; the use of Trust Fund moneys to subsidize nonmembers and persons relying on music merely as a part-time supplement to some other principal employment; and the dissemination of Trust Fund moneys by local union leaders as a form of patronage and favoritism.

The second principal theme of the hearings—the undemocratic structure and procedures of the Federation—was sounded by Read and other witnesses, particularly Bob Crosby. It was pointed out that the constitution, bylaws and usages of the AFM gave extraordinary power to the President and to the International Executive Board. Petrillo and the IEB could negotiate agreements without consultation with or ratification by the membership of any of the affected locals, and could enter into agreements to further the interests of the bulk of the union's membership, in order to preserve positions of power within the national union and in disregard of the interests of adversely affected local members. The AFM constitution also empowered Petrillo to annul and set aside not only any actions taken by local unions but also any provisions of the constitution and bylaws themselves. The testimony by Read and Crosby also underlined the fact that Local 47 was powerless to secure any redress within the available intra-union machinery. Its attempt to oust its unsympathetic officers was overruled by Petrillo; and it lacked voting power within the annual convention commensurate with its membership, because the voting rules were weighted against the largest locals and because even a reversal by the full convention of the Trust Fund policies of Petrillo and the IEB could be summarily reversed by Petrillo himself.

Read claimed that these and other grievances warranted the following

legislative remedies directed generally at all labor organizations: (1) prohibition of the absolute power of any union president or officers to annul any portion of the constitution or bylaws without the express approval of a majority of the members; (2) prohibition of the misuse of assessments collected for specific purposes such as welfare, pension, unemployment and strike benefits; (3) required submission of all collective bargaining agreements for approval by the members in the bargaining unit covered by that agreement; (4) prohibition of any evasion of the Taft-Hartley provisions dealing with voluntary employer payments into welfare funds; (5) required uniformity and nondiscrimination in assessments levied against union members; and (6) creation and enforcement of residual property rights in musical performances, so-called performing rights, under the copyright law and similar laws regulating the exploitation of artistic property.

The testimony offered in the two days of hearings in Los Angeles was often spirited and sometimes poignant. The Congressmen through their questions attempted to get a clear understanding of the sometimes complex operations of the various entertainment industries and the various Trust Funds. On several occasions, their questions became near rhetorical, expressing their indignation at the unilateral powers reposed in and sometimes exercised by the President of the AFM. In the hearing room were a significant number of Hollywood musicians, who on occasion punctuated favorable testimony with applause and unfavorable testimony with derisive laughter or with critical comments.

The subcommittee filed its slender report, only four pages in length, on October 10, 1956. The committee found that Local 47 had no voice in collective bargaining negotiations carried on at the national level and lacked effective control over its own affairs,¹⁴⁴ and stated that "it is unlikely that members of that local can ever obtain proper or adequate participation in the management of the affairs of the union."¹⁴⁵ The subcommittee's conclusions and recommendations, however, fell far short of the recommendations of Read and his supporters. The subcommittee concluded, first, that the federal government ought not interfere with the day-to-day relationships between union officials and union members. "[S]uch intraunion matters can and should be worked out within the structure of the labor organization itself; sooner or later in most cases the will of the members themselves will govern the conduct of the union."

The subcommittee's second recommendation went a bit further in the direction sought by Read. Using as a model section 302(c)(4) of the Taft-Hartley Act, which forbids an employer to deduct dues from the members' paychecks for purposes of paying them directly to the union unless the member has so authorized in writing,¹⁴⁶ the subcommittee suggested that it might be wise to require a similar employee authorization before the union

144. SPECIAL SUBCOMM. OF HOUSE COMM. ON EDUC. AND LABOR, 84TH CONG., 2D SESS., REPORT OF MUSICIANS PERFORMANCE TRUST FUNDS 3 (Comm. Print 1956).

145. *Id.*

146. 29 U.S.C. § 186(c)(4) (Supp. V 1981).

and employer could agree to have any other part of the employee's wages paid to the union or to a third party, such as the Trustee of the Music Performance Trust Funds. This approach would require the union to poll the employees in advance of collective bargaining to determine whether they preferred to receive part of their wage increase in the form of some other benefit, through the creation or continuance of a specific employee benefit plan. Although such a poll might delay the collective bargaining process, the subcommittee thought this disadvantage might be outweighed by the values of employee participation in the setting of collective bargaining policy and an administration of employee benefit plans that was satisfactory to the employees whose wages were being contributed. Since these issues went far beyond the particular problems of Local 47 and the AFM, the subcommittee recommended no more than that additional hearings be held to determine the feasibility of amending the Taft-Hartley Act to achieve such a result. The subcommittee also concluded "that further hearings regarding the operations of the musicians performance trust funds are not necessary when considered from the standpoint of possible Federal legislation. Hence, with this recommendation and report the subcommittee believes its assignment has been completed."

The report of the subcommittee, while generally sympathetic to the cause of the Hollywood musicians, must have provided only cold comfort. Its rejection of the suggestion that the federal government had a role in regulating intra-union affairs between officers and members frontally rejected one of the major objectives of Read and his supporters.¹⁴⁷

The subcommittee's second recommendation was not soundly based, either in precedent or in policy. Reliance on the Taft-Hartley rules regarding employee authorization for dues deduction did not prove the case for employee authorization for payments into specific benefit plans. The decision to require payment of union dues is one that the union and employer make in collective bargaining, without advance consent from individual employees. The consent is necessary only to approve a particular method for paying those dues (i.e., checkoff from periodic wages) in the absence of which the employee would have to pay the dues directly. Democratic determination of employee compensation policy is normally pursued not through advance direct vote of the membership, which the subcommittee acknowledged would commonly be impracticable and time consuming, but rather through the designation of negotiating committees and often through post-negotiation ratification procedures. Whatever the strength or

147. Ironically, Congress in effect ignored the subcommittee's conclusion when, within three years, it enacted the Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. §§ 401-531 (1976 & Supp. V 1981)), the principal feature of which was the so-called union members' bill of rights. That Act gave union members the right to participate in discussions at union meetings, to vote on union business, to run for union office, and to participate in the election of union officers. This congressional rejection of the suggestion that it had no role to play in assuring democratic relationships between union officers and union members was manifested in a law that bears the name of Congressman Landrum, the chairman of the subcommittee to investigate the Music Performance Trust Funds.

deficiencies of the subcommittee's suggestions for further hearings on the matter of pre-negotiation membership approval of benefit plans, no such hearings were convened and no such legislation introduced.

IX. THE TRUST FUND LAWSUITS

In late 1956 and early 1957, four lawsuits were brought in California state court by film and recording musicians who were members of Local 47. In each case, the defendants were the American Federation of Musicians, the Trustee of the Music Performance Trust Funds, and companies in either the recording industry or the film industry. Each lawsuit attacked the legality of one or another Music Performance Trust Fund, sought an injunction against payments to the Trustee and the appointment of a receiver to collect Trust Fund moneys for the plaintiff musicians, and sought damages against the Federation for payments already made to the Trust Funds.¹⁴⁸ The theory of recovery in each case was that the Federation, through its trust fund policies, had violated its fiduciary obligation as exclusive bargaining representative for the film and recording musicians. The actions were brought in California state court to guard against the possibility of the transfer of the case to a federal court in New York, where both the Federation and the Trustee had their principal offices, which would greatly inconvenience the plaintiffs and other principal witnesses.

The suit involving the phonograph record industry, *Anderson v. American Federation of Musicians*, proved to be the principal case. *Anderson* was brought first because it was thought to be the strongest case for the plaintiffs, and it was the only case of the four that went to trial. *Anderson* ultimately resulted in a judgment for the plaintiffs and precipitated the settlement of the other three cases.

The style and theories of the *Anderson* complaint set the pattern for the complaints that followed. The plaintiffs were recording musicians covered by the 1954 Labor and Trust Fund Agreements with the phonograph record industry. All of the ninety-one named plaintiffs, with the exception of Cecil Read, were members of the Federation and Local 47, and they purported to represent a group of 6,000 members. The complaint alleged that in the negotiations for the 1954 agreements, the Federation secured the oral agreement of the recording companies to a wage increase for the musicians, only to induce the companies to pay these "wage increase payments" to the Trustee, in addition to the "royalty payments" paid to the Trustee since 1948 and calculated as a percentage of the price of records sold. This diversion of wage increase payments and royalty payments to

148. The first lawsuit, *Anderson v. American Fed'n of Musicians*, was filed on Nov. 20, 1956; it attacked the Music Performance Trust Fund pertaining to the phonograph record industry. The second lawsuit, *Atkinson v. American Fed'n of Musicians*, was filed on Nov. 29, 1956; it attacked the Music Performance Trust Fund pertaining to theatrical motion pictures. *Beilmann v. American Fed'n of Musicians*, filed on Apr. 30, 1957, attacked the Trust Fund pertaining to films made for television. Finally, *Bain v. American Fed'n of Musicians*, filed June 6, 1957, attacked the Trust Fund pertaining to electrical transcriptions of radio programs and to commercial announcements for radio and television.

the Trust Fund allegedly violated the Federation's fiduciary duties to the plaintiffs as their bargaining representative.¹⁴⁹ The complaint also alleged that the Federation, acting out of hostility toward the plaintiffs, failed to bargain in good faith, and negotiated away the wages and property interests of the plaintiffs through the device of the Trust Fund payments. The complaint further asserted that President Petrillo and the International Executive Board, motivated by a desire to retain control over the affairs of the Federation and perpetuate themselves in office, used the Trust Fund payments to win the support of member musicians who received the payments at the plaintiffs' expense.

The complaint also articulated three other causes of action: one under the California Labor Code, which barred an employer's withholding of any part of an employee's wage "either wilfully or unlawfully or with intent to defraud an employee, a competitor, or any other person";¹⁵⁰ one against the Federation only, in the amount of \$1,737,900 for wage increase payments already paid to the Trust Fund under the 1954 agreement; and another only against the Federation for royalty payments in the amount of \$6,750,000 already paid, in the preceding four years, as royalties to the Trust Fund (the four-year period apparently having been dictated by the applicable statute of limitations).¹⁵¹

The relief requested on the principal cause of action was an order forbidding the defendant recording companies from making any wage-increase payments or royalty payments to the Trust Fund and requiring them instead to make such payments to the recording musicians; requiring the Trustee to hold the Trust Fund for the benefit of the musicians who recorded the phonograph records, or their heirs; forbidding the Trustee to disburse any past or future wage-increase payments or royalty payments to anyone other than the recording musicians; and impounding all Trust Fund payments presently or in the future in the custody of the Trustee, and directing the recording companies and the Trustee to transmit such moneys to either a receiver appointed by the court or to the court itself. These funds would then be divided among the recording musicians according to shares determined by a referee appointed by the court.

The second case, *Atkinson v. American Federation of Musicians*, challenged the Federation's decision in June 1955 to divert to the Trust Fund re-scoring fees formerly paid to recording musicians upon the release of theatrical motion pictures to television. The twenty-two plaintiffs prior to 1948 were musicians performing in motion pictures produced prior to 1948 for theatrical exhibition and released to television under the Labor Agreements of 1952 and 1954, who claimed to represent some 2,400 members of

149. The complaint asserted that under the 1954 Labor Agreement diverting "wage increase payments" to the Trust Fund, more than \$1,737,900 had been paid to the Trustee, and that \$2,250,000 more would be paid during the balance of the agreement unless the defendant recording companies were enjoined. (This was in addition to \$5,750,000 in anticipated "royalty" payments, based on record sales, for the balance of the 1954 agreement.)

150. CAL. LABOR CODE § 222 (West 1971).

151. See CAL. CIV. PRAC. CODE §§ 337, 343 (West 1982).

the Federation. All of the named plaintiffs, with the exception of Cecil Read, were members of the Federation and of Local 47.

The complaint set forth the terms of the 1952 and 1954 agreements, which provided that the original recording musicians would receive \$25 upon the release of the motion picture to television and also provided for the payment by the motion picture companies to the Trustee of five percent of the gross revenues received for the television exhibition rights. These provisions for re-scoring fees or re-use payments allegedly reflected an established principle of wage negotiation in the motion picture industry and a valuable property right of the performing musicians. In June 1955, however, the International Executive Board—acting on the pretext that the recording musicians or their heirs entitled to the re-use payments could not be located, which the plaintiffs alleged the IEB knew to be untrue—authorized President Petrillo to demand unilaterally that the motion picture companies make the re-use payments instead to the Trust Fund. Petrillo's action was allegedly timed so as to divert to Trust Fund recipients vast amounts of re-use payments.¹⁵²

A second cause of action was stated, as in the *Anderson* case, founded on the California Civil Code. Other causes of action were alleged regarding the five percent royalty payments under the 1952 and 1954 contracts, on the theory that these would have been used to augment the musicians' re-use payments had the Federation acted loyally, conscientiously and in good faith, and in accord with its fiduciary obligations.¹⁵³ The relief sought in the motion-picture case was comparable to that sought in the phonograph-record case.

The third lawsuit, *Beilmann v. American Federation of Musicians*, named as plaintiffs a class of some 1,200 musicians employed by companies in the production of motion pictures made primarily or solely for television under the Television Film Labor and Trust Agreements of 1951 and 1954. The 1951 Trust Agreement required the defendant television film companies to pay to the Trustee five percent of the gross revenues received for the exhibition of television films produced under the companion Labor Agreement, including revenues from all future exhibitions and re-runs of those films. The same arrangement prevailed under the 1954 agreements.

152. The complaint also recited the agreements made by the major motion picture producers—RKO, Paramount, Columbia, Twentieth-Century Fox, Warner Brothers, MGM, United Artists and Republic—for the release of thousands of old films to television. The complaint alleged that approximately \$1,495,000 in re-use payments had been diverted from the plaintiffs to the Trust Fund since June 1955, and that, unless the defendant companies were enjoined, some \$5 million would be diverted to the Trust Fund from films already licensed or sold to television, and another \$5 million would be diverted under licenses or sales to be made in the future.

153. Separate causes of action were alleged against the Federation, seeking \$1,495,000 damages for re-use payments diverted to the Trust Fund since June 1955, and \$2,973,950 damages for the royalty payments in that period. A specific claim was made against defendants that were serving as licensing or distributing companies for the motion picture producers and that were thereby required to become signatories to the Trust Fund Agreement; and another specifically against the Trustee for money had and received for the benefit of the plaintiffs in the preceding six months totalling \$200,000.

The complaint alleged that the Federation had violated its obligation of loyalty and good faith by failing to protect the property interests of the plaintiffs in their wages, including compensation that the television film companies would have been willing to pay the musicians for re-runs of films. As in the earlier cases, there were allegations of hostility; of the unfair creation of a subsidy from the bargaining power of the plaintiffs for the benefit of musicians not in the film-recording industry and not union members; of the responsibility of Petrillo and the members of the International Executive Board, who were motivated by a desire to perpetuate themselves in office; of constructive fraud; and of the exhaustion of plaintiffs' intra-union remedies through its Appeal to the IEB and to the 1956 Convention. The plaintiffs asserted that the total number of musicians engaged in the production of television films was 1,200, less than one-half of one percent of the AFM membership; yet the members of Local 47 were alleged to provide ninety-four percent of all of the live instrumental music used for television films, and an equivalent proportion of the payments made to the Trust Fund. The plaintiffs further claimed that some \$2,100,000, the property of the plaintiffs, had in the past been diverted in the form of five percent royalty payments to the Trust Fund, and that \$600,000 would be so diverted in the future from the television films already produced that utilized the plaintiffs' services.¹⁵⁴

Another cause of action, departing somewhat from the formulations of the *Anderson* and *Atkinson* complaints, focused on the loss of musical employment in television film as a result of the substantial Trust Fund payments required by the 1951 and 1954 agreements. The obligation to make the five percent royalty payments allegedly created such a cost differential between live music and old soundtrack or canned music that ninety percent of all television films made by the defendant film companies utilized foreign or canned music. Moreover, many shows formerly using live musicians had been discontinued, allegedly as a result of the Federation's Trust Fund policies. The plaintiffs sought a declaration that the 1954 Television Film Trust Agreement was invalid, along with the condition in the Labor Agreement that defendant companies hire no musicians until the companies had agreed to make payments to the Trust Fund. A related cause of action for damages, solely against the Federation, rested on the harm to the plaintiffs' employment caused by the royalty provisions, and emphasized the fact that the television film companies were ready, willing and able to employ the plaintiff musicians without paying royalties and to negotiate reasonable re-run payments to the plaintiffs for the exhibition of television films.

154. A second cause of action was asserted against the defendant companies that were in the business of selling, distributing or syndicating television films and were thereby required to become parties to the 1951 and 1954 Trust Agreements and to make royalty payments to the Trust Fund. A third cause of action was stated against the Federation, for the diversion of \$2,100,000 made as Trust Fund royalty payments rather than as compensation for the television film musicians. A fourth cause of action was asserted against the Trustee, for money had and received in the preceding one year, in the amount of \$800,000.

The relief sought included: an order forbidding the defendant companies to pay royalties to the Trustee and requiring such moneys to be paid to the plaintiffs; an order requiring the Trustee to hold the five percent royalty payments for the benefit of the plaintiff musicians as their property, and to pay such moneys only to them; an order impounding the royalty payments now or in the future in the custody of the Trustee, appointing a receiver, and appointing a referee to ascertain the plaintiffs' equitable shares; an order authorizing the defendant companies to employ plaintiffs without performing the conditions of the 1954 Trust Fund Agreement; and an order barring the Federation from disciplining plaintiffs working for companies that were not making royalty payments to the Trust Fund; and a judgment for damages of \$2,900,000.

The fourth lawsuit filed, *Bain v. American Federation of Musicians*, was something of a catchall, but its principal attack was upon the diversion to the Trust Fund of royalties from the re-use of radio transcriptions. The plaintiffs, a class of some 1,000 musicians all of whom were members of the Federation and of Local 47, were employed in the making of electrical transcriptions for radio and commercial announcements for radio and television. The 1948 Electrical Transcription Labor Agreement, which had expired on December 31, 1953, provided that if a signatory company wished to re-use or to dub a transcription or a commercial jingle or spot, it would first have to secure the permission of the Federation and to pay the recording musician the full scale payment that would be applicable to the new use, as additional compensation for the original performance. The same re-use restriction clause was also to bind persons to whom the signatory recording companies might sell the transcription. All signatory companies also had to sign the 1948 Electrical Transcription Trust Agreement, which obligated them to pay to the Music Performance Trust Fund three percent of the gross revenues received when electrical transcriptions, jingles or spots were used more than once on radio, such obligation lasting as long as the transcription continued in use. The complaint alleged that these Trust Fund payments were in substance wage increases for the plaintiffs and were improperly diverted by the Federation, in breach of its fiduciary duties and its obligation to bargain honestly, conscientiously and in good faith. The plaintiffs were alleged to constitute less than one-half of one percent of the Federation's membership, and to have been the object of a hostile attempt by President Petrillo and the International Executive Board to perpetuate themselves in office through their trust fund policies.¹⁵⁵ The complaint requested a holding that re-use fees and royalties

155. Further causes of action allegedly arose from the Transcription Labor and Trust Agreements of 1954, which increased the royalty payments to be made to the Trust Fund upon the use of electrical transcriptions; the 1954 and 1956 Labor Agreements relating to television jingles and spots, which provided for the payment of \$100 to the Music Performance Trust Fund for each jingle or spot when first exhibited on television; and a 1954 agreement between the Federation and the radio networks, which authorized the re-use of transcriptions by a different sponsor from the original one, provided re-use payments of \$27 per musician were made to the Trust Fund (in contrast to the \$54 scale rate which had previously been paid for such re-use to the recording musicians). Claims were also asserted

were the property of the plaintiffs, and that the union could not alter the dubbing restriction clause and the re-use restriction clause in the Labor Agreements except for the benefit of the plaintiffs who recorded the electrical transcriptions or the jingle or spot announcement.

In each of the four Trust Fund lawsuits the Federation, usually in combination with the other defendants, raised a number of defenses.¹⁵⁶ The Federation considered itself empowered, as the exclusive bargaining representative under the Taft-Hartley Act,¹⁵⁷ to enter into the Trust Fund agreements to create employment opportunities for the benefit of the entire Federation membership, a power that was also conferred by the bylaws of the Federation. Even if the court determined that the plaintiffs did have some grievance, however, the defendants contended that it was barred by such affirmative defenses as the statute of limitations, laches, estoppel, waiver and ratification, given the substantial period of time during which the plaintiff had raised no protest regarding the Federation's negotiations for the Trust Fund payments. Finally, the defendants claimed that the power of any court to hear these actions was pre-empted by the exclusive jurisdiction of the National Labor Relations Board.

In December 1956, shortly after the filing of the *Anderson* and *Atkinson* lawsuits in California, Trustee Rosenbaum initiated an action in New York state court designed to test the same issues addressed in the California cases. Rosenbaum wished to obtain a more favorable ruling on the merits, more expeditiously, and in a more convenient forum. *Rosenbaum v. Melnikoff* named as defendants the American Federation of Musicians, the signatories of the labor and trust agreements in the phonograph record industry and the theatrical motion picture industry, and some two dozen musicians previously employed in the production of phonograph records and in the scoring of motion pictures made primarily for theatrical use and thereafter released to television. The New York action requested a declaratory judgment recognizing the validity of all of the pertinent labor and trust agreements and determining that the defendant Federation had violated no duty to the recording and film musicians. If the New York court were to determine that the musicians named as defendants there were representative of the same class of musicians as were the plaintiffs in the *Anderson* and *Atkinson* cases in California, this would significantly impair

against NBC and CBS for diverting to the Trust Fund re-use payments deriving from the re-broadcast, with new sponsors, of transcriptions of such radio shows as "Gunsmoke," "Jack Benny," and "Dragnet"; against the AFM, for \$2,150,000 allegedly wrongly paid to the Trust Fund pursuant to the union's Electrical Transcription Labor and Trust Agreements; and against Trustee Rosenbaum for \$200,000 for moneys had and received in the preceding year.

156. The defendants argued a number of threshold issues. First, the defendants claimed that Samuel Rosenbaum was an indispensable party under California law who had to be personally served within California in order to confer jurisdiction on the court. Rosenbaum had in fact been served in New York City. Second, if the California Code of Civil Procedure were construed to permit such constructive service, Rosenbaum's constitutional rights under the due process clause of the federal constitution would be violated.

157. 29 U.S.C. § 159(a)-(b) (1976).

the effectiveness of the California lawsuits and presumably render any decision in New York preclusive of a decision on similar issues in California.

The plaintiffs in the *Anderson* case moved quickly, and on December 4, 1956, Judge Ford issued a temporary restraining order barring the making of any wage-increase payments by the phonograph record companies to the Trustee until the court could pass upon the motion of the plaintiffs for a preliminary injunction against such payments and for the appointment of a receiver to impound the moneys. After three days of hearings in mid-January 1957 (in both the *Anderson* and *Atkinson* cases) Judge Ford denied the motion for preliminary relief on the ground of lack of jurisdiction. He concluded that the non-resident Trustee was an indispensable party and that provisional relief could be granted by a California court only if the Trustee were personally served there. The office of the Trustee was in New York, all collections for the Trust Funds were made there, and disbursements originated there. Judge Ford stated that, had there been no jurisdictional defect, sound discretion would probably have warranted the issuance of a preliminary injunction against further payments to the Trust Funds. Although technically, the ruling merely prevented the issuance of injunctive relief, and left viable the plaintiffs' claims in the two cases for some \$13,000,000 in damages for the past diversion of plaintiffs' compensation, it appeared likely that the court would ultimately conclude that Trustee Rosenbaum was as indispensable to the disposition of that claim as he was to the disposition of the equitable claim for injunction and the appointment of a receiver. The plaintiffs promptly prepared an appeal of Judge Ford's order and moved for an injunction pending appellate review, but Judge Ford denied the motion.

In *Anderson v. Superior Court*¹⁵⁸ the district court of appeals unanimously directed that a writ of mandate issue commanding the lower court to assume jurisdiction over the appeal for preliminary relief.¹⁵⁹ The Supreme Court of California affirmed the intermediate appellate court.¹⁶⁰ The supreme court concluded that any court of that state having jurisdiction over the defendant recording companies, which were subject to the claims of the Trustee for payments to the Trust Fund, also had quasi in rem jurisdiction, upon constructive service of the Trustee outside California, to adjudicate the ownership of the moneys, debts, funds and obligations impounded by the receiver or owed by such resident debtor-defendants.¹⁶¹ The trial court in *Anderson* could therefore issue a preliminary injunction against recording companies doing business in California, appoint a receiver for the collection of Trust Fund payments and exclude the Trustee from any right, title or interest in moneys due from the companies or moneys held by the receiver.¹⁶² Counsel for the Federation and the major phonograph record companies unsuccessfully sought review in the

158. 310 P.2d 145 (Cal. Ct. App. 1957).

159. *Id.* at 161.

160. 49 Cal. 2d 338, 316 P.2d 960 (1957), *cert. denied*, 357 U.S. 569 (1958).

161. 316 P.2d at 963.

162. *Id.* at 966.

United States Supreme Court.¹⁶³ Throughout this entire proceeding for writ of mandate, Judge Ford had continued in effect the temporary restraining order barring the making of any wage-increase payments by the defendant phonograph record companies to the Trust Fund; this effectively created a res upon which the jurisdiction of the California trial court could operate.

On January 8, 1958, after the decision of the California Supreme Court and before the denial of the writ of certiorari, the *Anderson* plaintiffs secured a favorable ruling from Judge Ford on their renewed request for preliminary relief. The judge issued a preliminary injunction restraining the defendant recording companies from making any wage increase payments to the Trustee, and granted plaintiffs' motion for the appointment of a receiver pendente lite to collect and impound such funds.

Although the time had apparently arrived for all parties to the California lawsuits to develop their cases on the merits, the litigation tangle grew more intense. When Rosenbaum, Petrillo and other Federation officials failed to respond to the plaintiffs' requests for depositions, the plaintiffs had to resort to the trial court in New York to issue a subpoena duces tecum in aid of the California litigation. A subpoena was issued; the Federation and the Trustee moved to vacate; the denial of the motion was appealed to the New York Appellate Division¹⁶⁴ and then to the New York Court of Appeals, both of which sustained the issuance of the subpoena.¹⁶⁵ Other subpoenas were issued, avoided and attacked, in the courts of both New York and California. Ultimately, the Federation entered into a stipulation providing for the taking of the depositions of Petrillo and other members of the International Executive Board in New York City. The depositions were taken, and other pre-trial discovery ensued.

X. THE RISE OF THE MUSICIANS GUILD AND THE NEW REGIME IN THE AFM

By the end of 1957, Cecil Read and the other dissidents in Local 47 had fought their battle against the international union and its officers at several levels. They had pursued an appeal to the International Executive Board, which shunned their attack upon the union's Trust Fund policies. They had attempted to take over control of Local 47, but that led to their trial on charges before the Executive Board and their expulsion from union membership. They had instigated congressional hearings and apprised a legislative subcommittee of their union's autocratic operations and of their economic plight, but no legislative initiative developed. They had commenced four massive lawsuits in the courts of California, seeking millions of dollars in damages and the effective dissolution of the Music Performance Trust Fund. The dismissal of their case had just been reversed by the

163. *Columbia Broadcasting Sys. v. Atkinson*, 357 U.S. 569 (1958).

164. *In re Atkinson*, 4 A.D.2d 1020, 169 N.Y.S.2d 420 (1957).

165. *In re Atkinson*, 5 N.Y.2d 841, 181 N.Y.S.2d 785 (1958).

California Supreme Court, and a long road lay ahead before judgment could be rendered. As 1958 began, the dissidents planned for a more direct attack upon the control and policies of the Federation. They formed a rival union.

In January 1958, the labor agreement between the Federation and the motion picture producers had expired and negotiations were proceeding for a new agreement at the national level. The principal spokesman for the union was, of course, President Petrillo, who was aided by union representatives from the major studios. In addition, representatives from Local 47 had prevailed upon Petrillo to allow them to participate in the negotiations; they were formed into a committee of some sixty persons representing the musicians at all of the studios, and they had formulated some fifty-five proposals. Although Petrillo was somewhat wary of the bargaining ability of the group from Local 47, he felt that the officers had supported him in the conflict with Cecil Read, and he gave them some responsibility in the negotiations.

The film producers were proving intransigent. The downturn in motion picture attendance and production had reduced the need for fulltime staff musicians in the studios. These musicians were paid an annual salary for their services, but some were drawing a full year's pay by putting in only 150 to 350 hours of work. Moreover, the studios had already released to television many of their theatrical motion pictures made before 1948; the exhibitors had expressed concern about the release of later motion pictures, for fear that their availability on television would further reduce box office proceeds. The studios, however, were anxious to win the contractual right to release to television some of their post-1948 films to free those films from royalty payments to the Music Performance Trust Fund. The obligation to pay five percent of the gross revenues along with the twenty-five dollar re-scoring fees based on the number of musicians in the original film had been converted into an obligation simply to pay six percent of the gross revenues to the Trustee.

On the other side of the bargaining table, the Federation proffered the demands of the Local 47 musicians, which could only be characterized as extravagant, given the state of the motion picture industry. Demands were made for more than a doubling of the wage scale, and for substantial increases in the size of studio staff orchestras. Petrillo urged his bargaining team to be realistic and to limit their demands to those considered most important. The committee from Local 47 responded by incorporating all fifty-five proposals into five omnibus demands.

The producers walked out of the negotiations, and the Federation called a strike among the motion picture musicians. The producers continued to score their soundtracks, first by recording in Mexico and England and then, after the AFM secured the cooperation of the unions there, by recording in Munich and Rome. The studios sent their editors, composers and orchestra leaders to Europe, and scored soundtrack there for less than

the cost would have been in the United States. A Federation-induced public boycott of these films had no serious impact.

Cecil Read feared that the widespread use of foreign musicians and canned soundtrack, which had been so harmful to the Hollywood musicians in television films, would deal a similar blow to their employment in theatrical films. Read saw that the studio strike was having little effect, and there appeared to be little concern on the part of Petrillo, who was about to have his deposition taken in the pending lawsuits brought by many of the Hollywood musicians. In March 1958, Read rented a hall and called a meeting of interested film musicians; some 125 of the 300 studio staff musicians attended. Read encouraged those in attendance to petition Petrillo to reopen negotiations with the producers and to eliminate or modify the Trust Fund arrangements in order to save employment in the motion picture industry. This petition proved unavailing. Read became convinced of the need to form a rival union among the motion picture musicians and to oust the AFM as their bargaining representative.

In April 1958, Read and three others formed an association, the Musicians Guild of America. Authorization cards were distributed among the film musicians, who were assured that their signing would be held in confidence; the obvious sanction for such dual unionism would be expulsion from the AFM and the likely loss of job opportunities. The Guild held meetings at Read's home and rented space for an office. Many of the members of Local 47 sent donations to the Guild. During that same month, the Musicians Guild of America filed a petition with the National Labor Relations Board for a representation election. Under the applicable law, the filing of the petition forced a cessation of bargaining between the Federation and the studios. The strike was also effectively terminated, a development that opened the officers and members of the Guild to the charge of George Meany, President of the AFL-CIO, that they had "committed the grievous sin of strike breaking against their union brothers."¹⁶⁶

Hearings before the NLRB were scheduled for June 1958. The Federation was under substantial pressure; it was being sued for millions of dollars in the four California lawsuits, its strike effort was weak and its strike fund depleted, and a representation campaign would have to be waged. The Federation therefore stipulated that the appropriate bargaining unit in which the election was to be held would include those musicians, numbering roughly 1,400, who had received two calls to work during the preceding eighteen months from the major movie studios in Los Angeles County. The election was held on July 10, 1958, and the Guild won by a narrow margin.

Negotiations promptly commenced between the Guild and the producers, covering both theatrical motion pictures and the films made by the producers for direct use on television. Unencumbered by a nationwide constituency, the Guild could focus its attention solely upon the economic

166. INT'L MUSICIAN, Aug. 1958, at 45.

situation of the Hollywood musicians. A major problem to be addressed was the extensive use of canned music, American and foreign, in the scoring of films. The Guild hoped to secure more employment for its members in the Hollywood studios, particularly in television films, and to secure a favorable contract with the Hollywood producers that it could use as a springboard for successes in other segments of the entertainment industry.

The task turned out to be more onerous than the Guild had anticipated. Ironically, the difficulty was attributable in some considerable measure to the fact that they secured along the way a long-sought objective, the end of the reign of James C. Petrillo. In late April 1958, Petrillo had been subjected to very intensive questioning during depositions in the Trust Fund lawsuits. In May, one month before the Federation's Annual Convention, *The International Musician*, a union publication, carried a lengthy letter from Petrillo to all of the officers and members of the Federation announcing his intention to refuse the nomination of the Convention as President of the Federation.¹⁶⁷ Petrillo recounted his long service in the labor movement, with the Chicago local, the international union, and the American Federation of Labor and AFL-CIO, and stated that his intention had been to retire at the 1957 Convention but that he had reconsidered because of the then recently initiated trust fund lawsuits in California. Now that he had given his deposition and had been advised by his attorneys that the suits might go on for years, he felt that at age sixty-six the time was right for retirement.

In reflecting upon his accomplishments, Petrillo in his letter gave first mention to the creation of the Music Performance Trust Funds in the record and motion picture industries, and the fact that the funds had both encouraged the appreciation of live music by the public and generated employment for union members. He extolled the practice of democracy within the union, and expressed his gratitude to those who had supported him in times of adversity in the face of attacks both from within and without the union. "I am leaving you an honorable organization with a good, clean record, which gives me great personal satisfaction. But after forty-two years as a labor leader, I believe the time has come when I am entitled to spend whatever years I have left in relaxing and doing the things I want to do for my family, my friends and myself."

At the June 1958 Convention, hundreds of delegates—led naturally enough by a band—marched to the stage urging Petrillo to reconsider his decision to resign, but the urgings were to no avail.¹⁶⁸ The contestants for the presidency were Herman D. Kenin, a member of the International Executive Board since 1943 and a former president of Local 99 in Portland (and a former practicing lawyer), and Al Manuti of Local 802 in New York City. Petrillo stated that when he became President of the Federation he was recommended by his predecessor, Joe Weber, and that he, too, had his own successor in mind and would identify him should the Conven-

167. *Id.*, May 1958, at 6.

168. *Id.*, July 1958, at 29.

tion so desire. On motion, the Convention expressed its desire, and Petrillo named Mr. Kenin. The election was held the next day, and Kenin won by a vote of 1,195 to 608. A resolution was introduced to make Petrillo an advisor to the union and its officers and to pay him his former presidential salary for the rest of his life, but Petrillo declined to accept any payment so long as he continued to receive a salary as president of the Chicago local.

The attention of the Convention delegates was not focused exclusively on the presidency, for the next day a resolution was introduced seeking a concerted effort within the union to deal with the problems created by the Musicians Guild of America and with the intimations within the motion picture and recording industries that the Trust Funds might be terminated.¹⁶⁹ After discussion, the resolution was reworded so as to refer simply to the "difficulties in Los Angeles" and was endorsed by the Convention and later adopted by the International Executive Board, which referred the resolution to President Kenin.¹⁷⁰

In the summer and fall of 1958, as the Musicians Guild of America was negotiating an agreement on behalf of the Hollywood film musicians, Kenin began to articulate and implement a philosophy far more congruent with that of the Guild than Petrillo's had been. In August, after negotiating with two large producers of television films, Revue Productions and Desilu Productions, the Federation executed agreements that placed priority upon security of employment and dramatically curtailed the producers' obligations to make Trust Fund payments. These five-year contracts provided for a ten percent pay increase after the third year, and also included employment guarantees for American musicians, even for film shows formerly utilizing canned music. The Revue Productions contract provided for a payment of only one percent of revenues to the Trust Fund, in contrast to the five percent payments formerly required. The Desilu Productions contract eliminated altogether the concept of a percentage payment to the Trust Fund derived from the gross revenues on each production, and substituted a diminishing-scale flat-fee payment for the second through fifth re-runs of the show.¹⁷¹

The next major shift in emphasis in the Trust Fund policies of the Federation came with a speech by President Kenin in September 1958. Adverting to the dual-union movement in Los Angeles and the attacks upon the Trust Funds, Kenin stated:

The Trust Funds are not major objectives of the Federation. Indeed, accurately speaking, they are not objectives at all. They are rather a means—an important one, but just one of several—to achieve the Federation's basic objective. And that objective, of course, is live jobs for living musicians or, put otherwise, the survival of live music.¹⁷²

169. *Id.*, Aug. 1958, at 37.

170. *Id.*, Sept. 1958, at 43.

171. *Id.*, Aug. 1958, at 6-7.

172. *Id.*, Oct. 1958, at 8.

He labeled "absurd" the suggestion that the Federation was more interested in the growth of the Trust Funds than in the welfare of the members. "The fact is, of course, that the Federation has always stood willing, able and even anxious to exchange Trust Funds payments for direct live employment. That is the whole point of the Funds and the consistent policy of the Federation." He referred to the recent television film contracts, and their "conversion" of Trust Fund payments into guaranteed employment, as not an abandonment of the Trust Fund policies but a "complete fulfillment" of them.

Kenin then turned in his speech to the certification of the MGA as bargaining representative for the major motion picture producers. He expressed his fear that dual unionism in a time of diminishing work opportunities would undermine the objectives of the union movement. "Where jobs are relatively few and job seekers are relatively many, and there is no single scale set by a single union, the result is obvious:—wages and other conditions can only go in one direction—down—way down." He pointed to the MGA negotiations just completed with the producers of theatrical and television films, and outlined the extent to which the Federation's achievements in those industries had been undermined by the MGA through its weakness and its lack of experience.

In the same month as the Kenin speech, the Musicians Guild of America had consummated an agreement with the major motion picture producers, some two months after their NLRB election victory. The objectives of the Guild were to reduce unnecessary costs in the scoring of television film, principally by eliminating payments to the Trust Fund, to increase employment of the Hollywood musicians in substitution for canned music, and to increase their wage scale. The agreements permitted the television film producers to develop a "track library" for each series, containing the show's theme music, opening and closing music and the like; and to re-use that library on that series. Beyond that, every show had to use some music recorded live by American musicians represented by the Guild. At least one recording session of three hours was to be called for each series, at which all of the music to be used in thirteen segments of that series (one-third of a season) could be scored. The producers agreed that they would not use the soundtrack of any television film recorded during the agreement for any other television film or series during the life of the contract and for ninety days thereafter. Similar restrictions were made applicable to theatrical motion pictures: old track would not be used in films made in Los Angeles during the term of the contract and for ninety days thereafter, and during the same time period soundtrack recorded by Guild musicians would not be used in any other film released for theatrical exhibition.

Although the Guild negotiators would have wanted to secure residual payments for its members when television films were re-used in subsequent seasons, they felt that their association did not have the economic power to extract such a concession from the film producers. Of course, the

principle of the re-use or residual payment, tantamount to a "property right" or a "performance right" in the musicians' creative performance, was one that had been embraced by Cecil Read in the Trust Fund Appeal in January 1956, the Trust Fund Hearings in April 1956, and the Trust Fund lawsuits in late 1956 and early 1957. But it was one thing to embrace that claim in principle, and another to implement it in collective bargaining. The MGA knew that were it to induce a work stoppage in support of its claims for residual payments, the television film producers would simply revert to the use of canned music.

As the September 1958 speech by President Kenin demonstrated, the leaders of the AFM were quick to subject the MGA film agreements to detailed criticism. They pointed out that under those agreements theatrical motion pictures could be released to television without the Guild's consent; that soundtrack from one film could be dubbed into any other film if the producers could hold out beyond ninety days in the next negotiation; that soundtrack made for a television film could be dubbed into an entire series; that the Guild contract contained a no-strike provision; that canned music (the "library track" of theme songs) could be dubbed in with live music. All of these concessions were condemned as significant retreats from longstanding policies of the Federation. The MGA had also tolerated the substitution of a system of so-called casual or free-lance employment in place of studio staff orchestras with guaranteed salaries. Moreover, the Guild had permitted the film producers to score the music for an entire thirteen-week series in one three-hour session while, although the AFM scale was somewhat lower, the Federation contracts had authorized the scoring of only one film per session. The failure of the Guild to secure residual payments came under particularly heavy attack. Kenin said that the longstanding AFM policy against the unregulated use of theatrical film on television was discarded by "a man who for two years was ranting and raving about the fundamental rights of performing musicians to residual payments. Under his contract, motion picture films can be used on television repeatedly and endlessly without payments either to the individual performers or to the trust funds."¹⁷³

Undaunted by the AFM criticism of their agreements with the Hollywood motion picture studios, the leaders of the Guild filed with the National Labor Relations Board in October 1958 a petition for another representation election, this time on behalf of musicians engaged in making phonograph records in Los Angeles County. As with the bargaining unit for the Hollywood studio musicians, the Guild hoped that by limiting itself to this narrower geographic constituency it could secure a majority of the votes and free itself of the Federation's Trust Fund policies. Because the Guild's petition was limited to the Los Angeles recording musicians, it presented no legal obstacle to the commencement of negotiations for a new agreement between the AFM and representatives of the phonograph companies covering recording elsewhere.

173. *Id.* at 13.

The Federation negotiated a new five-year agreement in January 1959. Once again, the agreement reflected a retreat by President Kenin from his predecessor's single-minded attention to the growth of the Music Performance Trust Funds. The improvement in the wage scale for the recording musicians was dramatic. In December 1958, scale pay for these musicians was \$41.25 for a three-hour recording session, the same as it had been for thirteen years. The former contract had also required that twenty-one percent of scale, or \$8.66, multiplied by the number of recording musicians was to be paid to the Music Performance Trust Funds. In the contract of January 1959, scale was increased to \$48.50, still less than the two payments under the previous agreement. But the new agreement created for the first time in the industry a pension plan, into which the recording companies were to pay five and one-half percent of scale per musician. The agreement also provided for increases in scale for each successive year, so that beginning in October 1962 a musician would receive \$56.00 for a three-hour session; in addition, the payments due to the Pension Fund would increase to eight percent of scale earnings, generating total compensation of \$60.48.

Consistent with the new approach that had been reflected in the television film contracts negotiated by Kenin soon after becoming President of the Federation, the 1959 agreement provided for a cutback in the contributions of the phonograph record manufacturers to the Music Performance Trust Fund. From January 1956 through December 1958, the wage-increase payments of twenty-one percent of scale, which had been so controversial when negotiated by President Petrillo in January 1954, had been paid to the Trust Fund. The agreement of January 1959 eliminated those payments. The Trust Fund obligation of the recording companies reverted to the previous level of roughly one percent of the retail price of records sold.¹⁷⁴

The new phonograph record industry agreement adverted to the petition currently pending with the NLRB seeking a representation election in Los Angeles and stated:

The parties hereto believe that the unit sought therein is clearly inappropriate. Out of deference to the processes of the Board, however, the parties agree that, in the case of any company which is named as a party in any such petition, the increase in minimum scale provided for in this agreement shall not be paid for services performed in Los Angeles County unless and until said petition is dismissed or otherwise finally disposed of in favor of the Federation.

It provided that such companies were, in the interim, to open an escrow account and to deposit currently, at the same time they were paying wages to the musicians, the difference between the 1954 scale and the scale provided for in the new agreement.

174. In a pamphlet distributed by President Kenin, in which he described the new agreement and pointed out the new benefits secured therein, he stated: "Many of our recent gains were made possible by exchanging Music Performance Trust Fund contributions for jobs, pensions, residuals, and pay increases."

Other industry agreements negotiated by the American Federation of Musicians in 1959 continued to pay greater attention to the compensation of the film or recording musician and somewhat less attention to the Music Performance Trust Funds. In February 1959, agreements covering live radio and television programs on the networks sought to maintain staff orchestras in some of the larger cities at a time when the need for them, particularly in radio, was sharply dwindling. These agreements also established pension funds in these industries for the first time. In May 1959, new agreements between the Federation and the television networks, covering television film, continued the pattern of the Revue and Desilu agreements by reducing Trust Fund payments in exchange for increased live employment of musicians. In November 1959, a new agreement relating to jingles and spot announcements in radio and television traded Trust Fund payments for wage increases, residuals and pensions for the recording musicians.

XI. THE SETTLEMENT OF THE TRUST FUND LAWSUITS

The period beginning in June 1958 with the resignation of James Petrillo from the Federation presidency witnessed a lessening of commitment by the Federation to the Music Performance Trust Funds. The Trust Funds remained an important element in the union's philosophy and in its bargaining activities, but the zealous attempt to expand the level of contributions to the Trust Fund, typically at the expense of the film and recording musicians, was apparently a thing of the past. At the same time, the Trust Funds were being attacked in courts of law on three different fronts. One such front, of course, was in the state courts of California, where depositions had been taken in the spring of 1958 and the parties were preparing for trial a year later.

The Trust Fund in the motion picture industry, pertaining to the release to television of theatrical motion pictures, was also being challenged, in the federal district court in New York. In 1957, Republic Productions, Inc., one of the major producers of theatrical motion pictures, had instituted an action in federal court in California, seeking treble damages under the Sherman Antitrust Act. The case was transferred the following year to the federal district court in New York. The complaint charged that the defendants—the AFM, the International Executive Board, and Trustee Samuel R. Rosenbaum—had conspired to restrain and monopolize interstate commerce in the distribution and licensing of motion pictures for exhibition on television. The case was not to be concluded until July of 1965, when the court dismissed the action.¹⁷⁵ Although the assault by Republic

175. Republic Prods., Inc. v. American Fed'n of Musicians, 245 F. Supp. 475, 483 (S.D.N.Y. 1965). The New York district court traced the history of negotiations in the motion picture industry—the 1946 ban on the release of theatrical films to television, the 1951 agreement requiring that any films so released were to be fully re-scored, the 1952 agreement requiring instead the payment of re-scoring fees to the original film musicians, and the Trust Agreements requiring payments to the Music Performance Trust Fund of five percent of the producer's gross revenues from the television exhibition. The court considered the so-

Productions upon the Trust Fund was ultimately rebuffed, the case was very much alive in the period from 1958 to 1965.

The third legal attack upon the Music Performance Trust Funds was directed at the fund in the phonograph record industry. It was in the form of shareholders' derivative actions brought by shareholders of the Radio Corporation of America (manufacturer of RCA Victor Records), the Columbia Broadcasting System (manufacturer of Columbia Records), Loew's Corporation (manufacturer of MGM Records), and Decca Records, Inc., against those corporations and Trustee Samuel R. Rosenbaum.¹⁷⁶ Those actions were instituted in New York federal district court in 1955—even before Cecil Read had been sent by the members of Local 47 to argue their case before the International Executive Board—and challenged the legality of the Phonograph Record Trust Fund under section 302 of the Taft-Hartley Act.¹⁷⁷ The plaintiffs claimed that the Trustee was a "representative of employees" under the Act¹⁷⁸ and that therefore the payments to him from the phonograph record manufacturers violated section 302. The relief sought was an injunction against any payments to the Trustee from the companies and any disbursements from the fund by the Trustee. The court found that "[t]he legislative history of Section 302 shows that it was directed against the establishment of funds exacted from employers and administered by union officials at their unlimited discretion and without any obligation whatever to account."¹⁷⁹ The court held that neither the provisions of the Trust Agreements nor the Trustee's administration of the Trust Funds made him a "representative of employees" under the Taft-Hartley Act.¹⁸⁰ This judgment was not, however, rendered until February 1959, after the Musicians Guild of America had petitioned for an election among the Los Angeles recording musicians and the AFM had negotiated an agreement in the phonograph record industry that redirected the wage-increase payments allegedly taken from the recording musicians in January 1954 and diverted to the Trust Fund.

The principal attack upon the Music Performance Trust Funds lay in the four California lawsuits spearheaded by Cecil Read. The trial of *Anderson v. American Federation of Musicians*, which attacked the Trust

called labor exemption from the antitrust laws, found in the Clayton Act and the Norris-LaGuardia Act, and concluded that had the Federation engaged in a work stoppage to secure the above agreements, the stoppage would have been exempt from the Sherman Act; the union was acting in its self-interest and was carrying out its legitimate objects in collective bargaining. *Id.* at 482. If a strike to secure these objectives is lawful, so too, concluded the court, must be a collective bargaining agreement effecting those objectives. Even the 1946 total ban on release of theatrical films to television was lawful: "Its purpose was to protect professional musicians, members of the union as a whole, from the competition of recorded music. In the final analysis, therefore, the clause related to the economic welfare of union members, to their job opportunities and to the wages which they would eventually receive." *Id.*

176. *Shapiro v. Rosenbaum*, 171 F. Supp. 875 (S.D.N.Y. 1959).

177. 29 U.S.C. § 186 (1976 & Supp. 1981).

178. *Id.* § 186(a)-(b) (1976).

179. *Shapiro v. Rosenbaum*, 171 F. Supp. 875, 885 (S.D.N.Y. 1959).

180. *Id.* at 883-84.

Fund in the phonograph record industry, opened on March 9, 1959, before Judge Kincaid of the California Superior Court. The Federation prevailed on its demurrer to the two causes of action against the AFM for damages resulting from payments previously made to the Trustee. The court agreed with the Federation's contention that the plaintiffs as members of a voluntary unincorporated association could not bring an action against themselves. This adverse ruling induced the plaintiffs to file for a postponement of the trial on the principal cause of action for equitable relief against the Trust Fund payments; they intended to seek review of the demurrer.¹⁸¹ This strategy was abandoned, however, when counsel for the plaintiffs learned that the Appellate Division in New York had denied the request of the defendant musicians in *Rosenbaum v. Melnikoff* for a stay of that proceeding pending the outcome of the California lawsuits.¹⁸² Counsel appreciated the risk of the New York action's being tried first, with the attendant need to transport the *Anderson* and *Atkinson* witnesses and documents to New York, as well as the risk of any judgment in New York having res judicata and estoppel effects in California. The *Anderson* plaintiffs thus chose to resume the trial on their principal cause of action in California for declaratory and injunctive relief against the Federation, the Trustee and the defendant recording companies.

After some twenty trial days, in March and April 1959, Judge Kincaid upheld the plaintiffs' principal contentions on the facts and the law, and held that the plaintiffs were entitled to judgment. The judge concluded, at the outset, that the plaintiffs had properly brought the action on behalf of a valid class and that they had exhausted all of their internal remedies within the Federation. He found that the phonograph record companies had offered the Federation a wage increase for recording musicians in negotiations for the 1954 Labor Agreement, but that the Federation knowingly and in bad faith diverted this increase to the Music Performance Trust Fund. Judge Kincaid rejected the defendants' affirmative defenses of waiver, laches, estoppel, statute of limitations, and ratification. Acknowledging that his jurisdiction was limited to the wage increase payments in the hands of the court-appointed receiver or still retained by any of the enjoined recording companies, the judge concluded that the plaintiffs had a property right in the proffered wage-increase payments in the 1953-54 negotiation, and that the Federation had violated its fiduciary duty in diverting those payments to the Trust Fund.¹⁸³ The defendant Trustee was deemed to have no right, title or interest in the wage-increase payments forthcoming from the defendant record companies or already in the hands of the receiver. The preliminary injunction against the defend-

181. The claim for injunctive relief based on an alleged violation of the California Labor Code had earlier been withdrawn.

182. *Rosenbaum v. Melnikoff*, 7 A.D.2d 975, 183 N.Y.S.2d 986 (1959) (no opinion), *aff'g* 15 Misc. 2d 601, 179 N.Y.S.2d 700 (N.Y. Sup. Ct. 1958).

183. See Petition for Allowance of Attorneys' Fees, Harold A. Fendler and Daniel A. Weber, at 72-73, *Anderson v. American Fed'n of Musicians*, Case No. 669,990 (Cal. Super. Ct., L.A. County).

ant recording companies was made permanent, requiring them to pay wage-increase payments withheld by them not to the Trustee but to the receiver. Not surprisingly, notices of appeal were filed by the Federation and by certain of the recording company defendants. The plaintiffs filed a cross-appeal challenging the dismissal of the two causes of action for damages against the Federation.

While the appeals were pending, meetings were held in December 1959, among counsel for the plaintiffs in the *Anderson* case, the general counsel for the AFM, and Samuel Rosenbaum. These meetings explored the possibility of settling all the Trust Fund lawsuits pending in California. The settlement discussions were pursued in a spirit of cooperation and fairness, and after several meetings the parties reached a proposed agreement. Kenin, the President of the AFM, endorsed this proposed settlement in a letter addressed to the president of the locals in San Francisco, Chicago, Los Angeles, Nashville, and New York City, and it was unanimously approved in April 1960 at meetings of the Musicians Defense Fund in Los Angeles and in New York.

In the *Anderson* case the settlement terms called for all moneys presently in the hands of the receiver, totalling more than \$1,900,000 plus interest, to be distributed to the recording musicians after deducting the receiver's fees and other litigation expenses. An additional \$215,000 or more, representing wage-increase payments (calculated at twenty-one percent of scale earnings) that were due and owing to the Trustee from record companies that were not defendants in the California action, would be assigned by the Trustee to the receiver for collection and distribution to the recording musicians. This total of more than \$2,250,000 represented substantially all of the twenty-one percent wage raise diverted from the recording musicians since the filing of the *Anderson* action. The agreement did not, however, include the wage-increase payments of ten percent of scale that had already been paid into the Trust Fund in 1954 and 1955, which Judge Kincaid had held could not be recovered as damages from the Federation.

In the *Atkinson* case, Trustee Rosenbaum was to pay \$1 million to the California receiver to be divided as ordered by the court among the musicians who worked on theatrical motion pictures that were released to television. The amount paid to each musician—including conductors, arrangers, copyists and contractors—would be in proportion to the number of such motion pictures in which he worked.

The *Beilmann* case, which involved the five percent royalties payable to the Trust Fund on the exhibition of films made primarily for television, was to be settled simply upon the payment by the Trustee to the receiver of \$50,000 to cover court costs and legal fees. The principal objective of that lawsuit had already been achieved. The new AFM television film agreements had replaced the five percent Trust Fund payments with a smaller flat payment on the second through the seventh re-runs; and additional employment for musicians had been secured, at the expense of foreign

canned music, through more favorable agreements negotiated by both the AFM and the Musicians Guild of America.

In the *Bain* case, which involved re-use of transcribed radio shows, the Trustee was to pay the receiver \$50,000 to cover fees, as well as \$89,000 to be distributed to the musicians who had recorded certain radio shows; those shows had been transcribed for one-time use but had been subsequently re-broadcast upon the payment of \$89,000 to the Trust Fund. The other principal target of the *Bain* lawsuit, the \$100 Trust Fund payments on radio and television jingles and spots, had already been eliminated through changes in the Federation's contracts, which exchanged the \$100 Trust Fund payments for a wage increase, pension fund contributions, and a percentage re-use fee for the recording musician if the jingle or spot was used for more than six months.

Under the proposed settlement, the plaintiff musicians in the four cases would receive a total of roughly \$3,500,000—consisting of \$2,000,000 from the receiver, and \$1,500,000 from the Trustee of the Music Performance Trust Funds. The settlement proposals also dealt with the New York proceeding in *Rosenbaum v. Melnikoff*, which was awaiting trial. The parties wished to avoid an independent judgment in New York that might undermine the disposition of the California cases. Ultimately the parties agreed that the New York case should be resolved in a manner "parallel" to the California cases, and that the principal step to be taken was the formal appearance of the Trustee in the California actions and his consent to the judgments there. This proposal required approval by the New York court and the New York attorney general under New York law governing the operation of charitable trusts.

These proposed settlement terms were endorsed not only by Kenin, Rosenbaum and members of the locals principally affected, but also by Cecil Read and his supporters. The Read group concluded that the settlement terms embodied to a substantial degree the objectives they had been pursuing since the appeal to the International Executive Board, the revolt within Local 47, and the formation of the Musicians Guild of America.

All of the parties to the proposed settlement understood that it would have to be approved by the California court and by the plaintiff musicians in all of the cases, and that the courts of New York would have to authorize the Trustee to appear in the California actions. A petition for judicial approval of the settlement was filed in the California court in June 1960, and within a month the terms of the proposed settlement were published in the Federation's newspaper, *The International Musician*; in *Allegro*, the publication of Local 802; in *Overture*, the publication of Local 47; and in the *Los Angeles Daily Journal*. In September 1960—almost four years after the *Anderson* case was commenced—Judge Wolfson signed an order approving the settlement of all four cases. Protracted legal maneuvering, however, delayed a formal approval in New York of the Trustee's participation in the California cases until November 8, 1963, when the New York Supreme Court, after a lengthy hearing before a referee, determined that

the settlement in California was fair and equitable and that the Trustee should be authorized to appear in the California actions for the purpose of consenting to the judgment there and consummating the settlement.

All that now remained was to reduce the settlement agreement to a final order in California. Judge Kincaid had retired since hearing the *Anderson* case, but he was appointed to sit pro tem at the hearing of April 15, 1964, at which time the *Anderson* appeals were dismissed by stipulation, the 1959 findings of fact and conclusions of law were vacated, the written general appearance of the Trustee was filed, and a modified judgment in the terms of the proposed settlement was entered. The so-called Trust Fund lawsuits, begun in November 1956, thus finally ended in April 1964.

XII. THE RECONCILIATION OF THE FEDERATION AND THE GUILD, AND THE NEW AFM LABOR AGREEMENTS

By the middle of 1960, the Musicians Guild of America was receiving mixed reviews, at least as measured by the votes of its constituents. Two years after its election victory among the film musicians in the major Hollywood studios, the Guild won an election among musicians employed by the Alliance of Television Producers and prevailed in ten elections involving the musicians of ten small phonograph record companies. But it was losing its support in the major studios producing theatrical motion pictures and television films. Its contracts there had been loudly and effectively criticized by the AFM, while at the same time President Kenin was negotiating contracts in the phonograph record industry and other sectors of the television film industry that gave substantial economic benefits to the recording and film musicians, typically through dilution of the Trust Fund payments. In a proceeding before the National Labor Relations Board, the Board held that although the collective bargaining agreement between the Guild and the motion picture producers was to run for three and one-half years, it would serve as a bar to a fresh representation election only for the first two years of its duration. Accordingly, upon petition of the American Federation of Musicians a new election was held among the Hollywood musicians in the summer of 1960, and they chose the AFM over the incumbent Guild.

The AFM then commenced negotiations on three fronts. The negotiations with the motion picture producers covering television films led to the so-called Television Film Labor Agreement—Motion Picture Producers Association Pattern. Talks with the networks covering the filmed television programs that they produced resulted in the Television Film Labor Agreement—Network Pattern. Finally, the AFM negotiated with the motion picture producers with regard to theatrical films. Agreements in all three industries became effective on January 1, 1961. Those agreements marked an increased concern on the part of the AFM for the economic interests of the film musicians and a further retreat from the aggrandizement of the Music Performance Trust Funds. Indeed, the Trust Funds in those industries were effectively extinguished.

Of the three agreements, the television film agreement with the motion picture producers (the MPPA Pattern) was the only one that made no provision for residual payments (or some equivalent) to the musicians for later re-uses of their recorded performances. But other substantial economic benefits, however, were secured. Scale for a three-hour recording session was increased to \$61.75; minimum scoring hours for each thirteen weeks of a half-hour series were increased from twelve to eighteen hours; "library track" could not be mixed on a television show with live music; the re-use of theme music for a single series was allowed, but not beyond one year; and for the first time in the industry, the producers were to make payments to the AFM-Employers' Pension and Welfare Fund, calculated at three percent of the employees' scale earnings. The Guild contracts negotiated in 1958 left one major legacy: no payments were to be made to the Music Performance Trust Funds for films produced during the term of the contract.

Perhaps the most dramatic benefit secured by the Federation in its 1961 agreements was the introduction of residual payments for the re-use of filmed television programs produced under the Network Pattern agreement. The formula was based upon that utilized in the 1959 television film agreement with Desilu and also upon the collective bargaining agreements negotiated in the television industry by the American Federation of Radio and Television Artists. The AFM agreement provided that when a television film produced during the contract term was exhibited on television for a second or subsequent time, the musicians who scored that film would receive re-use payments, in declining amounts through the sixth showing.¹⁸⁴ The trade-off for this important benefit was the demise of the obligation to pay five percent of the gross revenues from re-runs to the Music Performance Trust Funds. The networks and other signatory companies also agreed to minimum scoring requirements and to a new obligation to contribute five percent of the musicians' scale earnings to the Pension and Welfare Fund.¹⁸⁵

184. For example, if the orchestra originally performing on the television film soundtrack had twenty-one or more musicians, each musician would not only be paid at scale for the original recording session (the scale figure was \$50.00), but he would also share in a payment of \$125 when the program was shown a second time; \$62.50 for a third showing, and the same amount again for the fourth showing; and \$31.25 for each of the fifth and sixth showings; there were to be no payments for the seventh and subsequent showings.

185. This somewhat anomalous dichotomy between filmed television programs produced by the motion picture studios and filmed television programs produced by the networks has continued to this day. The Federation now negotiates a Television Film Labor Agreement and a Television Videotape Labor Agreement. The former governs, for the most part, television programs with a dramatic or comedy story line, while the latter—an outgrowth of live television and then of kinescope television—principally governs variety shows, daytime serials and game shows. There is considerable flexibility as to which producers and distributors execute which agreement, and almost all, in fact, execute both. The major difference between the two is that the Television Film Agreement to this day contains no provision for residual payments to the film musicians, although that has for years been a principal demand of the Federation at the bargaining table and generally the last to be relinquished; indeed, the union undertook a five-month strike against the film producers over this issue in late 1980, with no success. The Videotape Labor Agreement does provide for re-use pay-

With the 1961 Network Pattern television film agreement, the Federation and the networks thus expressly recognized that some of the commercial success of a television film was fairly to be shared with the musicians who scored the film. Cecil Read and the leaders of the Local 47 revolt had perhaps lost their battle with the AFM on behalf of the Musicians Guild of America, but they had won the war for the endorsement of performers' rights and for the effective demise of the Trust Fund in television films.

A similar war was won in the 1961 collective agreement negotiated by the Federation with the motion picture studios covering theatrical motion pictures. The parties negotiated new wage scales and provided that they were to be increased by five percent on October 1, 1961, and further increased by seven percent on November 1, 1962. The producers would pay three percent of scale earnings to the Pension and Welfare Fund for the first time. Most dramatically, the film producers agreed that if they released to television any theatrical motion picture made on or after February 1, 1960 (which included the last nine months of the Guild agreement), the producer would pay to the original film musicians a pro rata share of one and two-thirds percent of the producer's receipts from the distribution of the film to television.¹⁸⁶ Each musician would receive a share of this fund measured by his own earnings for the scoring of the particular theatrical film in comparison to the earnings of all of the musicians.¹⁸⁷

In exchange for the payments to the film musicians on the release of theatrical films to television, the Federation made two major concessions.

ments. Today, the videotape musician receives 75% of current scale for the original scoring, for the second run and the same for the third run; 50% of scale for each of the fourth, fifth, and sixth runs of the show; 10% for the seventh run; and 5% for the eighth and all subsequent runs.

In recent years, with the opening of new geographic and technical markets for television film and videotape, the Federation has expanded its interest in negotiating for the equivalent of re-use payments for the film musicians. Thus, the videotape agreement contains a provision for the payment of 45% of scale to the videotape musician when the program is broadcast outside of the United States and Canada, subject to a reduced percentage payment if the foreign area is relatively confined. Even the Television Film Labor Agreement now provides for payments to film musicians when their television program is exploited in supplemental markets such as video cassettes or pay television. For such uses, the producer-signatory must pay one percent of its "accountable receipts" from the distribution of the film in the supplemental markets. This is divided among all of the musicians who recorded on that film, with each receiving a pro rata share measured by his individual earnings on the film compared to the earnings of all musicians on that film. (A similar provision appears in the Television Videotape Agreement.) These payments are made to a Television Film Special Payments Fund to be distributed as additional wages for the film musicians. The current Television Film Labor Agreement also provides that if a television motion picture is exhibited in motion picture theatres, the producer has the choice of re-scoring (an option that is never utilized) or paying all of the musicians who scored the film 50% of their scale earnings when the film is first placed in theatre exhibition.

186. This was defined as the producer's gross revenues less an arbitrary 40% to cover distribution fees and expenses.

187. Since 1972 those payments for the distribution of theatrical motion pictures to television have been paid into a fund known as the Theatrical and Television Motion Picture Special Payments Fund, which is supervised by an independent administrator. Today's agreements also provide for payment by the producers of one percent of their "accountable receipts" from the marketing of their theatrical motion pictures in the supplemental markets to the Special Payments Fund and pro rata distribution to the film musicians.

Theatrical films produced during the term of the labor agreement and subsequently released to television would no longer generate payments to the Music Performance Trust Funds. Moreover, the Federation acquiesced in the claim of the motion picture producers that they no longer had an obligation to make payments, either to the Trust Funds or to the musicians, for the release to and exhibition on television of theatrical motion pictures made before 1960. Before the 1958 negotiations between the producers and the Musicians Guild of America, the producers had been paying—pursuant to the June 1955 declaration of the International Executive Board of the AFM—five percent of their gross revenues to the Music Performance Trust Funds. The producers argued to the AFM, however, after the Federation had regained its status as bargaining representative, that the intervention of the Guild agreement had dissolved any obligation to make Trust Fund payments under the prior Trust Agreements.

Although the Federation in the period from 1959 to January 1961 was thus negotiating agreements in the recording and film industries that were much more favorable than those of the past to the recording and film musicians, the Guild—although it had lost its bargaining status in the major Hollywood studios—was still a force to be reckoned with. In 1960 the Guild had won elections among the employees of a number of television producers and small phonograph record companies.

The Guild contracts with the record companies were to run for four years, during which time the companies would pay increases in wage rates and terminate contributions to the Music Performance Trust Funds. The Guild secured wage scales that were substantially higher than those negotiated by the Federation in its 1959 contracts with the bulk of the recording companies.¹⁸⁸ The Guild labor agreements also required the parties “to use their best efforts to evolve an equitable plan for payments of royalties and health and welfare benefits to musicians.” This provision articulated for the first time in the phonograph recording industry a commitment to the principle that record sales should generate payments to the recording musicians themselves, and not simply payments to the record manufacturers or to a trust fund.

Just as the AFM had widely advertised the perceived failings of the Guild contracts in the motion picture industry, the Guild called its higher negotiated wage scale to the attention of the recording musicians in Chicago, New York and Los Angeles. In May 1961, the Guild wrote to some 5,000 musicians, asking “Wouldn’t you like to be paid Guild scales whenever you work for a record company?” and enclosing signature cards for authorizing the Guild to serve as collective bargaining representative. The Guild promised to petition for National Labor Relations Board elections, which would oust the AFM in mid-contract. The response of the recording musicians to the Guild appeal revived the Guild’s threat to the hegemony.

188. Under the Federation agreements, the scale payment in 1960 was \$51.50; in 1961, \$53.50; and in 1962, \$56.00. During the same years under the Guild contracts with the smaller record companies, the scale was to be \$67.50, \$70.00, and \$72.50.

ony of the AFM in the phonograph record industry. The leaders of both the Guild and the AFM appreciated, however, that the Guild campaign would probably not bring total victory for either association among the employees of the major recording companies, and that divided representation would weaken the bargaining position of the musicians. The leaders of the Guild and the Federation decided to meet and explore a settlement of their differences. Negotiations took place in the summer of 1961 among Herman Kenin, Cecil Read, representatives of the governing boards of the AFM and the Guild, and the attorneys for both organizations. Contemporaneously, Kenin appeared before the 1961 AFM Annual Convention and stated on behalf of himself and the International Executive Board that "we stand ready to exchange *any* part of the Trust Fund payments for a better deal for the working musician."¹⁸⁹ A number of delegates from some of the smaller locals opposed this position, stating that the Trust Funds had been a substantial aid to them in preserving live music. A resolution was in fact introduced to bar Kenin's recommendation, but it was defeated by a voice vote.¹⁹⁰ Kenin and the Board regarded this as an invitation to take appropriate action to restore all film and record musicians to the AFM fold.

By the end of the summer the Musicians Guild of America and the American Federation of Musicians had reached agreement.¹⁹¹ The Guild representatives promised to dissolve their organization as soon as possible. The Federation agreed to take several major steps: (1) On the subject of re-use and residual payments, the Federation would seek to induce the phonograph record manufacturers to pay fifty percent of the moneys currently payable to the Music Performance Trust Fund to the musicians who made the recordings. "Additionally the Federation reaffirms its policy to seek residual or reuse payments for the recording musician in all other recording fields." (2) Those former members of Local 47 and the Federation who had been expelled because of their support of the Guild would be reinstated with full, uninterrupted rights. All fines imposed on musicians for supporting the Guild would be nullified and, if already paid, those fines would be refunded. (3) "The Federation reaffirms its policy to grant to all musicians employed in the fields within the Federation's jurisdiction the right to ratify all contracts it negotiates." (4) The Federation would establish a committee, to be periodically and democratically elected by all Los Angeles members working in the recording field—records, transcriptions, theatrical and television film, and jingles and spots. The committee, whose members were to be actively working in the recording field and

189. VARIETY, June 14, 1961, at 45.

190. *Id.*, June 21, 1961, at 51.

191. In a letter from Herman Kenin dated Sept. 5, 1961, to the Board of Directors of the Musicians Guild of America, Kenin, after expressing "my personal and official thanks for the unfailing courtesy displayed by your representatives throughout the course of these conversations," stated that all parties had acted on the fundamental premise "that the interest of professional musicians could best be promoted by the consolidation of their total economic and political power into a single union."

which would represent copyists and arrangers as well as instrumental musicians, would have the right to communicate advice and opinions directly to the Federation on all matters relating to recording musicians. This Recording Musicians Advisory Committee would also advise the Federation on the formulation of bargaining demands and send a representative to serve in an advisory capacity at all Federation labor negotiations.

Cecil Read and the other officers of the Guild called a meeting of their membership, roughly 1,000-strong, and the members gave their consent to the agreement with the AFM, and voted to dissolve the Guild and to permit their current agreements in the various entertainment industries to lapse in favor of the Federation. Thus, by the fall of 1961, Cecil Read and his colleagues at the Musicians Guild of America had substantially achieved the objectives that they had articulated and fought for some six years before. The AFM had permitted the Music Performance Trust Funds effectively to terminate in their agreements covering theatrical motion pictures and television film and television commercials, and had made a commitment to balance Trust Fund payments in the phonograph record industry with comparable payments to the recording musicians. Relieved of the burden of Trust Fund payments, all of the industries granted significant pay increases to the film and recording musicians, in the form of direct wages and contributions to pension, health and welfare funds. The concept of the re-use or residual payment for the recording and film musicians was embraced by the AFM, which had already negotiated successfully for such payments in network television films and theatrical motion pictures, and which was to bring them within three years to phonograph records and transcriptions, television videotape programs and television commercials. As members of Local 47 and the AFM, the former rebels could participate in the shaping of collective bargaining policy and the ratification of labor agreements. During the preceding year the California court had approved the favorable settlement of the Trust Fund lawsuits. The trial and judgment in the *Anderson* case had effectively established that the Federation could not unfairly or discriminatorily ignore the economic interests of the film and recording musicians while bargaining for a nationwide constituency. The settlement of all of those cases brought to those musicians some \$3.5 million; because of the delay in the disposition of the *Rosenbaum* case in New York, and the enormous complexities of calculating the appropriate shares of all of the musician plaintiffs in the judgment, however, payments to the individual musicians were not begun until 1967.

It was in the 1964 contract with the phonograph record manufacturers that the Federation was first able to follow through on its promise to secure residual payments for recording musicians based on record sales. For all recordings made during the term of the 1964 agreement, the companies promised to pay into a fund for a period of ten years from the date of first release a percentage of income from record sales based on the suggested

retail price of the record. On the average, the musicians' fund would receive one percent of the retail price of each record sold.

In the preceding Federation agreement in the phonograph record industry, negotiated in 1959, the royalty on record sales to be paid to the Music Performance Trust Fund had increased to an average of two percent of the retail price of each record sold. In effect, the 1964 agreement reduced the Trust Fund contributions by half, with half going instead to the fund for the recording musicians themselves.

This fund, known as the Phonograph Record Manufacturers' Special Payments Fund, would be administered by the United States Trust Company, separate from the coffers of the union. Before distribution of the fund to the musicians, the administrator would subtract its administrative expenses and the "manufacturers' share" of the fund, which comprised social security taxes, unemployment insurance, disability and workmen's compensation payments, and the like, that were owed by the recording companies on the payments to the fund. The remaining proceeds would be distributed to those musicians who had performed on records in the preceding year.¹⁹²

At the same time as the Federation was negotiating its 1964 Phonograph Record Labor and Trust Agreements, it was also negotiating new agreements covering the musicians performing on electrical transcriptions for radio. The predecessor agreement, negotiated in 1959, had provided for payment to the Music Performance Trust Funds of three percent of the revenues from the distribution or licensing of transcriptions. The 1964 agreement, following the pattern of that year's contract in the phonograph record industry, provided both for an increase in scale pay and for a divi-

192. Each musician would receive a proportion of the total distributable fund "as scale wages payable to such musician in the immediately preceding calendar year by all [signatory recording companies] shall bear to scale wages payable to all such musicians in said calendar year by all [signatory recording companies]."

This division of royalties from records sold, with one-half going to the recording musicians and one-half to the Music Performance Trust Funds for live musical performances free to the public, continues to this day. There have, however, been slight modifications in the formula for contributions to and disbursements from the two funds. The record companies are now expected to pay .6% of the manufacturer's suggested retail price for all records sold (if less than \$3.79, and .58% if the price is higher), and .5% of such price for all tapes sold, to the Trustee of the Music Performance Trust Funds, who is now Martin A. Paulson. These payments to the Trust Funds are made only during the 10 years following a record's release for sale. An equal amount is paid to the Special Payments Fund. The disbursements to the recording musicians from the latter fund are no longer determined by their pro rata earnings during the preceding year. Instead, a formula weights each musician's earnings from recordings in the previous year and then accords gradually less weight to earnings during the preceding five years; this total is compared to the total earnings of all recording musicians over the preceding five years similarly weighted. In sum, a record will generate contributions to the Special Payments Fund if it has been recorded in the preceding 10 years, and will result in disbursements from the fund to musicians who have made any phonograph records in the preceding five years. In 1982, the Phonograph Record Special Payments Fund disbursed more than \$11 million to roughly 44,000 eligible recording musicians, for an average of approximately \$250 per person for the year. During the same year, the Music Performance Trust Funds disbursed nearly \$19 million in more than 600,000 checks to individual musicians performing in live concerts throughout the United States and Canada.

sion of the moneys that had formerly gone to the Trust Fund. Half of those funds would be paid to the Trustee and the other half would be paid to the recording musicians.¹⁹³

A little more than a year after the reconciliation of the American Federation of Musicians and the Musicians Guild of America in 1961, an item appeared in the *New York Times*, in small print almost lost within a clutter of short articles on the entertainment page:

James C. Petrillo, president of Local 10 of the American Federation of Musicians and former president of the federation, will face opposition for the first time since 1933 in next month's elections, it was disclosed today.

Chicago Musicians for Union Democracy, an anti-incumbent group, put up the name of Barney Richards, a pianist and band leader, at today's nominating meeting at the union's headquarters.¹⁹⁴

The results of that election some three weeks later made the front page:

James C. Petrillo was defeated today for re-election as president of the Chicago Federation of Musicians, Local 10.

The defeat apparently marked the end of a career going back to World War I for the 70-year-old Mr. Petrillo, a former head of the American Federation of Musicians.

He had held union offices since 1919. This was his first challenge in 30 years.

The official count gave Mr. Richards 1,690 votes and Mr. Petrillo 1,595.¹⁹⁵

The chairman of the opposition organization was quoted as saying, "This shows that professional musicians have taken control of their own union to be run in a professional manner with professional dignity."¹⁹⁶

XIII. THE MUSIC PERFORMANCE TRUST FUNDS TODAY

With the settlement of the Trust Fund lawsuits in 1960, and the negotiation of new Federation contracts soon after, payments ceased coming to the Trust Fund from newly produced television films, television and radio jingles and spot announcements, and theatrical motion pictures released to television. Since that time, the almost exclusive source of income for the Music Performance Trust Funds has been the sale of phonograph records. Allocations from the Trust Funds averaged approximately \$5.7 million per year in the 1960s, \$8.8 million per year in the early 1970s and \$11.5 million per year in the second half of that decade, and nearly \$19 million per year

193. That formula prevails today. The administrator of the Electrical Transcriptions Special Payments Fund receives these payments from the contract signatories and allocates the fund among musicians who have made such transcriptions within the preceding five years, utilizing the same weighted formula that applies to the Special Payments Fund in the phonograph record industry.

194. *N.Y. Times*, Nov. 14, 1962, at 44, col. 2.

195. *Id.*, Dec. 6, 1962, at 1, col. 8.

196. *Id.* at 50, col. 3.

since 1980. Since 1950, the Trustee has disbursed a total of more than \$258 million, and sponsored well over one million performances.

The current Trust Agreement in the recording industry provides that its object is the arranging and organizing of personal performances by instrumental musicians throughout the United States, its territories, possessions and dependencies, and Canada. The Trust Agreement has some 4,000 recording companies as signatories, but many of those were small and short-lived concerns, and only some 300 companies are presently the major source of contributions to the Trust Funds. Recording companies sign the Trust Agreement because it is a condition to the union's signing a labor agreement with those companies and supplying them with recording musicians.

The Trustee invites and receives recommendations for musical performances from locals of the AFM, although recommendations can be initiated from any number of sources, such as hospital administrators or park recreational directors. These requests for musical performances are referred to a local person who is charged with administering the Trust Funds. The Trust Fund designates the local administrator; that person need not belong to the union or even be a musician, but is commonly an official of the local union. The local administrator designates a leader for the musical event, and the leader selects the musicians for the performance. The selection of the musicians is thus not controlled by the Trust Fund or by the union, and the musicians need not belong to the AFM. The leader requests an allocation from the Trust Fund, which is subject to approval by the Trustee. If approved, a contract is created between the Trust Fund and the leader for the specific engagement. The performing musicians technically become employees of the Trust Fund, to be paid at prevailing local wage scales, and the Trustee remits a paycheck directly to the individual musicians after the local administrator states that the performance in fact took place.¹⁹⁷

The union locals and the local administrators also assist the Trust Fund by finding persons and institutions to co-sponsor the musical performances. Co-sponsors—which may be civic organizations, municipalities or county or state bodies, banks or utilities, and the like—will normally provide a hall and seating for the performance, printed programs and publicity, and sound equipment.¹⁹⁸ Co-sponsorship is attractive to such groups even though the performance must not be used to assist the co-sponsor in any commercial venture, because every cent of the co-sponsor's contribution is used for the performance itself. The Trust Fund bears all administrative and overhead expenses. Moreover, all of the administrative services rendered at the local level by local officials are cost-free to the

197. During the year ending April 30, 1983, the Trust Fund sponsored some 73,000 live music performances in parks, concert halls, hospitals, colleges, playgrounds, schools, libraries, and museums, and disbursed some 625,000 checks to individual musicians.

198. In the year ending April 30, 1983, money contributions from co-sponsors totalled some \$5,986,000.

Trust Fund. Administration of the Trust Fund consumes only fifteen percent of the Fund's total revenues.

Ninety percent of Trust Fund allocations are made to 700 localities in the United States and Canada, corresponding to the geographic jurisdiction of the AFM locals, according to a formula based upon the number of professional musicians in those localities as roughly represented by local union membership rolls. The Trustee thus has little discretion in determining how funds are distributed geographically. The allocation of the other ten percent of the fund is discretionary with the Trustee. This portion may be spent on projects that break through the geographic constraints of the union locals, such as the support of regional symphony orchestras or of live-audience television performances. The Trust Funds may not be permitted to accumulate, but must be spent currently. To assure that the signatory recording companies account properly for their contributions to the Trust Fund, the staff of the Fund pursues a regular auditing program that checks the sales and royalty records of each company once every two years. The staff also makes periodic unannounced visits to performances that are subsidized by the Trust Fund, to assure that Trust Fund conditions, such as free admission, as well as quality standards are satisfied.

Although President Petrillo originated the trust fund concept as a way of moderating the impact of unemployment resulting from the exploitation of recorded music, the Trust Fund today cannot properly be regarded as a welfare or unemployment fund. For one thing, the average check to the musicians engaging in a Trust Fund performance is hardly more than \$30. Moreover, most of the payments from the Fund are not received by unemployed workers. The great majority of the recipients hold full-time jobs outside the field of music—as teachers, lawyers, clerks or machinists—and play on occasion for enjoyment and as a small supplement to their income. Indeed, this situation also prevailed in the early 1950s, and gave rise in part to the grievances of the professional recording musicians in Los Angeles, whose services generated substantial contributions for the Trust Fund but rather modest income for them as performers at Trust Fund musical engagements.

The Trust Fund has always been operated with a scrupulous regard for its independence from the AFM and its officers. The regulations that govern the Fund take pains to state that it is not a union fund. All programs, publicity and announcements must state that the music is provided by a grant from the Trust Fund and must identify the Trust Fund as "created and financed by the Recording Industries under agreements with the American Federation of Musicians." When a project approved by the Trustee is one that a union local initially recommended, publicity and program material may give full credit to the local, but must not give the impression that the local provided the grant or the music.

XIV. CONCLUSION

The advent of recording technology in the entertainment industries created demands by the recording musicians to share in the profits that others made from re-use or re-broadcast of musical performances and created demands by other musicians to preserve their employment. Both of these demands can be accommodated, as the co-existence of the Special Payments Fund and the Music Performance Trust Funds in the phonograph record industry proves. But at root, these demands do clash, as each dollar taken from the industry to provide employment for the technologically displaced is one dollar less to provide for re-use or residual payments to the recording musicians. The more the industry is encouraged to use a recording many times over in the same form, or to transplant it into a different medium, with liberal payments to the recording musician, the greater is the risk of displacement for other musicians. Conversely, a ban on recording may preserve employment of live musicians, but it will also sharply restrict the income opportunities for recording musicians. The two principle techniques that the Federation has utilized to accommodate these interests are public action through legislation and private action through contract.

During his years as President of the AFM, James C. Petrillo was more preoccupied with the lot of the unemployed musician than with that of the recording musician. He was also more preoccupied with collective bargaining as a mode of advancing the interests of musicians than he was with legislation. Neither of these strategies proved altogether satisfactory.

Petrillo's reliance on private power rather than governmental protection is quite understandable. He believed, no doubt rightly, that the economic pressures that the AFM could bring to bear upon manufacturers and broadcasters would bring faster and more desirable results than would lobbying for protective legislation. At the beginning of his term as President, a work stoppage in the phonograph record or motion picture industry could exert severe economic pressure, as was true to a lesser degree of a work stoppage in network radio. Moreover, Petrillo apparently distrusted government, and he was to show disdain for governmental entreaties—including a presidential entreaty in time of war—throughout the 1940s. When Congress enacted the Lea Act in 1946 and the Taft-Hartley Act in 1947, which were viewed by members of the labor movement as severely repressive, it became obvious that the AFM could draw upon very little congressional sympathy.

Petrillo's emphasis upon the plight of the unemployed musician is also understandable. This choice was dictated by personal experience, personal philosophy and union politics. On the verge of becoming the president of Local 10 in Chicago when "talkies" were introduced, Petrillo saw tens of thousands of theatre musicians displaced, almost overnight. The widespread commercial exploitation, within only fifteen years, of phonograph records, motion picture soundtrack and television, was reasonably viewed by Petrillo as a threat to the livelihood of the working musician. The

twenty-seven month recording ban beginning in 1942 was a product of Petrillo's desire to avoid a repetition in radio employment of the grave employment loss in theatres hardly more than a decade earlier. Petrillo also developed a philosophy about the technology of sound recording. Unlike other forms of technological unemployment, the loss of employment caused by recorded music was brought about by fellow musicians, who might fairly be expected to share that economic burden. Concern for the displaced musician was also good politics. Only a small fraction of the Federation's total membership was engaged in recording music for phonograph records or films. The bulk of the membership benefited from Petrillo's concern, and they determined who would sit in the president's chair.

Thus, the Music Performance Trust Funds were a happy marriage for Petrillo of compassion, philosophy and power. One should not forget, however, that an insistent theme of the Federation's bargaining philosophy had always been the protection of the recording musician, at least when his "frozen performance" was translated into a different medium. The earliest AFM agreements banned the use of motion picture soundtrack in any film other than the one for which it was originally scored, and provided for payments to motion picture musicians when the soundtrack was used, for example, to make a phonograph record; the same was true when phonograph records were "dubbed" onto other records or onto soundtrack. The provisions in the 1951 agreements for re-scoring of theatrical films released to television, and in the 1952 and 1954 agreements for the payment of re-scoring fees to the original musicians, were thus part of the fabric of standard Federation practice.

Petrillo's severe difficulties within the union began when he departed from practice and single-mindedly exalted the interest of the so-called unemployed musicians—many of whom were in fact fully employed in other trades—over that of the recording musicians. Petrillo obviously believed that the recording musicians were being treated well enough and that the Federation discharged its obligations by securing high wage scales and imposing restrictions on re-use. But those wages failed to keep pace with the cost of living and with the wages of comparable crafts, and Petrillo's lack of concern for the recording musician became evident when he allowed the 1946 scale for phonograph record musicians to prevail through 1958.

Petrillo's preference for the unemployed musician gave way under the pressure of the efforts of men like Cecil Read. Petrillo's preference for collective bargaining rather than law was also to be a victim of events—events that were in part legal, in part economic, and in part scientific. All of these events conspired to sap the AFM of its strength at the bargaining table. The *Whiteman* case prevented the union from using its bargaining power in the recording industry as a means of removing phonograph records from radio broadcasts. Attempts to impose direct pressure on the broadcasters were totally undermined by the Lea Act of 1946, which outlawed strikes—and thus effective collective bargaining—designed to ex-

pand or preserve live employment in radio, to eliminate or restrict the use of records in broadcasting, or even to extract performance royalties for the recording musicians for the radio use of their recordings. The failure to pressure the broadcasters on the issue of "performers' rights" was attributable just as much to congressional mandate as to the preferences of Mr. Petrillo. The Taft-Hartley Act of 1947 went yet further and declared the secondary boycott illegal, thereby outlawing the use of economic pressure on radio networks to induce local affiliated stations to retain small staff orchestras.

Scientific and economic events deprived the union yet further of bargaining power. A union can lawfully exert economic pressure only where it represents employees. Throughout Petrillo's presidency, the use of the phonograph record on radio, and the use of "canned music" in motion pictures and on television films, reduced employment in those industries and thus reduced the capacity of the AFM to address this problem effectively through collective bargaining. The users of recorded music—the radio and television stations, and the motion picture exhibitors—cannot be pressured by the union because they do not employ live musicians and because of legal restrictions. The AFM must therefore exert its bargaining influence in dealings with the producers of recorded music, which are commonly in a position to withstand union pressure because of the availability of foreign or canned music.

Since the resignation of President Petrillo and the election of President Kenin, the Federation has given more attention to the problems of the recording musician and to the political process in Congress. As has been recounted above, the contracts negotiated by Kenin from 1958 until his death in 1970 were successful in securing payments for recording musicians measured by the number of records sold, or the number of showings of a television program, or the producer's revenues from the exploitation of the recording. On the congressional front, the Federation has supported legislation concerning restrictions upon the use of canned foreign music in television, restrictions upon the entry into the United States of non-immigrant alien workers (such as film crews and musicians), and subsidies for the arts and copyright protection for performers. Kenin and his successors as Federation president have also emphasized public relations campaigns and programs of cooperation with foreign unions.

The seeds of many of the Federation's current policies were thus sown in the late 1950s. It is hoped that this Article has provided a greater appreciation of the events that shaped the Federation of today.

* * *

APPENDIX: THE LEA ACT OF 1946

§ 506. Coercive practices affecting broadcasting; enforcement of contracts; penalties; definition.

(a) It shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation, or duress, or by the use or express or

implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel, or constrain a licensee—

(1) to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services; or

(2) to pay or give or agree to pay or give any money or other thing of value in lieu of giving, or on account of failure to give, employment to any person or persons, in connection with the conduct of the broadcasting business of such licensee, in excess of the number of employees needed by such licensee to perform actual services; or

(3) to pay or agree to pay more than once for services performed in connection with the conduct of the broadcasting business of such licensee; or

(4) to pay or give or agree to pay or give any money or other thing of value for services, in connection with the conduct of the broadcasting business of such licensee, which are not to be performed; or

(5) to refrain, or agree to refrain, from broadcasting or from permitting the broadcasting of a noncommercial educational or cultural program in connection with which the participants receive no money or other thing of value for their services, other than their actual expenses, and such licensee neither pays nor gives any money or other thing of value for the privilege of broadcasting such program nor receives any money or other thing of value on account of the broadcasting of such program; or

(6) to refrain, or agree to refrain, from broadcasting or permitting the broadcasting of any radio communication originating outside the United States.

(b) It shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation or duress, or by the use or express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel or constrain a licensee or any other person—

(1) to pay or agree to pay any exaction for the privilege of, or on account of, producing, preparing, manufacturing, selling, buying, renting, operating, using, or maintaining recordings, transcriptions, or mechanical, chemical, or electrical reproductions, or any other articles, equipment, machines, or materials, used or intended to be used in broadcasting or in the production, preparation, performance, or presentation of a program or programs for broadcasting; or

(2) to accede to or impose any restriction upon such production, preparation, manufacture, sale, purchase, rental, operation, use, or maintenance, if such restriction is for the purpose of preventing or limiting the use of such articles, equipment, machines, or materials in broadcasting or in the production, preparation, performance, or presentation of a program or programs for broadcasting; or

(3) to pay or agree to pay any exaction on account of the broadcast-

ing, by means of recordings or transcriptions, of a program previously broadcast, payment having been made, or agreed to be made, for the services actually rendered in the performance of such program.

(c) The provisions of subsection (a) or (b) of this section shall not be held to make unlawful the enforcement or attempted enforcement, by means lawfully employed, of any contract right heretofore or hereafter existing or of any legal obligation heretofore or hereafter existing or of any legal obligation heretofore or hereafter incurred or assumed.

(d) Whoever willfully violates any provision of subsection (a) or (b) of this section shall, upon conviction thereof, be punished by imprisonment for not more than one year or by a fine of not more than \$1,000, or both.

(e) As used in this section the term "licensee" includes the owner or owners, and the person or persons having control or management, of the radio station in respect of which a station license was granted. (June 19, 1934, ch. 652, § 506, as added Apr. 16, 1946, ch. 138, 60 Stat. 89.)

