

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MILWAUKEE MUSICIANS ASSOCIATION
LOCAL 8, AMERICAN FEDERATION OF
MUSICIANS, AFL-CIO

and

MILWAUKEE SYMPHONY ORCHESTRA

Case 10
No. 49212
A-5069
David Babcock Grievance

Appearances:

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., Post Office Box 12993, Milwaukee, WI 53212 by Ms. Marianne Robbins, Attorney at Law, appearing on behalf of the Milwaukee Musicians Association, Local 8, American Federation of Musicians.

Michael, Best & Friedrich, Attorneys at Law, 100 East Wisconsin Avenue, Milwaukee, WI 53202-4108 by Mr. Jonathan O. Levine, Attorney at Law, appearing on behalf of the Milwaukee Symphony Orchestra.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, the Milwaukee Musicians Association, Local 8, American Federation of Musicians, AFL-CIO (hereinafter referred to as the Association) and the Milwaukee Symphony Orchestra (hereinafter referred to as either the Employer or the Orchestra) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to act as arbitrator of a dispute concerning the filling of a temporary vacancy for principal French horn during the 1993-94 season. The undersigned was designated by the Commission, and a hearing was held on July 13th and August 30th, 1993 in Milwaukee, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted post-hearing briefs, which were exchanged through the arbitrator. The record was closed on November 17, 1993.

Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Award.

ISSUE

The parties did not agree on the issue in this case, and stipulated that the arbitrator should frame the issue in his Award. The Association proposed that the issue be stated as:

Did the Employer violate the parties' collective bargaining agreement when it denied Associate Principal French Horn David Babcock the right to fill in for Principal French Horn for the 1993-94 season? If not, what is the appropriate remedy?

The Orchestra believes that the issues is:

Whether management had the right to use audition procedures set forth in the contract to find a substitute for the Principal French Horn who requested and was granted a long term leave of absence for the 1993-94 season.

The issue may be fairly framed as follows:

Did the Employer violate the collective bargaining agreement when it did not appoint David Babcock to the temporary long-term vacancy in the position of Principal French Horn for the 1993-94 season? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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VII. SEASONS AND WAGE SCALES

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7.3 Substitute, Extra and Temporary Musicians. A substitute musician is a musician employed on a temporary basis to substitute for a musician who is on sick leave, military leave, or other approved leave of absence. An extra musician is a musician employed on a temporary basis to supplement the complement of regular players.

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Decisions regarding the hiring of extra or substitute musicians shall be made by the Music Director or the Associate Conductor but will be discussed in advance by the Personnel Manager or Conductor with the Principal Player of the section involved, unless a limited time factor due to an emergency precludes such discussion.

If it is the intent of management to engage a temporary player, other than a

substitute or extra musician, for more than three (3) consecutive weeks or three consecutive pairs of subscription concerts, the audition procedure outlined in Section 12.3 and 12.4 of this Agreement shall apply to such temporary player.

Substitute, extras, and temporary musicians shall be hired in a timely fashion. Any such musicians who work for six (6) or more consecutive months shall receive pro-rata vacation pay. Management shall make its best efforts to hire one (1) person to fill vacancies of one (1) year or longer. Such musicians hired for one (1) full contract year or longer shall be provided with health insurance, sick leave, and vacation benefits *** and shall participate in normal rotation.

. . .

7.5 Move Up Premium Pay and Procedures. . . .

During the regular winter seasons, and during the absence of the Principal, the Associate and Assistant Principals will assume the duties of the Principal with no additional compensation for periods of three consecutive weeks or less. Upon completion of the three weeks, the Associate or Assistant Principal and Management will negotiate an additional remuneration effective the fourth week of absence. However, in the event of a short-term leave of absence of any duration of a Principal, the Associate or Assistant Principal will assume the duties of the Principal upon negotiation with Management for additional remuneration effective at the beginning of the short term leave of absence. Associate Principals are required to be responsible for the principal part in a work or works without move-up pay when the principal is not absent. . . .

Musicians shall be required to advance sequentially within a section without additional compensation if requested by the Conductor to fill vacant chairs created by vacation, rotation, or other absence, except that no section musician shall be required to advance to a titled position under any circumstances. In the case of a move to other than a titled position, the move shall be without compensation. See additional provisions in Section 12.2 of the Agreement.

In each section of the Orchestra there shall be designated a principal and assistant principal, except where there is no candidate for the position of assistant principal, or in the French horn and trumpet section where there shall be designated an associate principal instead of an assistant principal. Furthermore, there shall be one associate principal, as well as the principal and assistant principal, in the first violin section. Selection for these positions shall be by audition whenever there is a vacancy or new position in the Orchestra. In the case of a new assistant principal without increasing the size of the section, the Music Director and principal of the section involved shall discuss the appointment, after which the

Music Director will select the assistant principal. . . .

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XII. AUDITIONS

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12.4 Audition for Extras and Substitute Musicians. Auditions shall be held at the beginning of each contract year to identify musicians qualified to perform with the Orchestra as extra and substitute musicians. Auditions for selection of these musicians shall be conducted by the Principal and/or Assistant Principal of the sections who wish to attend. Except for emergency situations, extra and substitute musicians shall be selected from the pool if available.

If it is contemplated that an extra or substitute position will require employment of a musician for three or more consecutive weeks, the Music Director may fill those positions from the pool or from the finalists of the last audition for that instrument.

Regular auditions shall be held for any extra or substitute position at the request of the Music Director or Audition Committee of the section involved.

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XIII. ATTENDANCE AT SERVICES, SICK LEAVE, LEAVES OF ABSENCE

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13.4 Long-Term Leaves of Absence. Musicians who have at least five years of service with the Orchestra are eligible for a leave of absence of one year or less. . . .

A leave of absence shall not be utilized by one person more than once every seven years and will be subject to management's ability to find an acceptable replacement for the musician through the auditions procedure. [Sec. 12.4]. No more than three musicians, nor more than one Principal Player shall be granted a leave of absence during any contract year. . . .

13.5 Short Term Leave of Absence. Any Orchestra musician may request a short term leave of absence of six weeks or less pursuant to the following procedures. . . .

. . .

BACKGROUND

The Employer is a symphony orchestra in Milwaukee, Wisconsin. The Association represents the musicians in the orchestra. The grievant, David Babcock, is the Associate Principal French Horn.

In October of 1992, Paul Trevelt, the Orchestra's Principal French Horn, informed

management that he intended to take a leave of absence during the 1993-94 season. A meeting was held in November between the grievant, Music Director Zdenak Macal and Personnel Manager Linda Unkefer. They discussed the possibility of the grievant moving up into the Acting Principal's position for the coming season. Macal expressed concern about artistic burnout, since the grievant was serving as the Principal French Horn for the Chicago Grant Park Symphony during the summer. The grievant disagreed, taking the position that the summer work schedule could be arranged so as to leave him time to prepare for the coming regular season. The two men agreed to speak again after sleeping on the question. The next day, the grievant confirmed that he did want to fill the Acting Principal's job.

On December 3rd, an advertisement was placed in the International Musician magazine, announcing that the MSO would be auditioning the position of Acting Associate Principal French Horn. On December 6th, a meeting was held with Joan Squires, the Executive Director of the MSO, Unkefer and the grievant. Squires told him that Macal continued to have concerns about having him as the Principal, but was willing to offer him the position of Co-Principal. The grievant refused, citing concerns over the workability of such an arrangement and its effect on his standing in the music world. A short time later, Squires contacted Macal and he told her to offer the grievant the Acting Principal's position, contingent on the finalization of the terms for Trevelt's leave. She communicated Macal's offer to the grievant and he accepted.

On December 31st, Assistant Personnel Director Richard Pretat and Unkefer convened an audition committee for the position of Acting Principal French Horn, consisting of the Principal Trombone, the Principal Trumpet and the Second, Third and Fourth French Horns. The grievant was not informed of the existence of the committee and was not invited to the meeting. At the outset of the meeting, Unkefer informed the members that the grievant was being considered as the Acting Principal French Horn. The grievant then showed up at the meeting, and Unkefer took him out of the room to explain that the purpose of the meeting was to communicate Macal's recommendation that he be appointed to the Acting Principal's job. The grievant agreed that it would be inappropriate for him to attend the meeting. When Unkefer returned to the meeting, she found that one of the members had another commitment, and it was agreed that the committee would reconvene at a later date.

The committee reconvened on January 5, 1993. After discussion, a secret ballot was conducted on the question of whether the position of Acting Principal or Acting Associate Principal French Horn should be advertised. Unkefer counted the ballots and informed the committee that the strong preference was to advertise the Acting Principal's opening.

The next day, Macal and Unkefer met with the grievant and told him of the committee's recommendation. Macal rescinded his offer to the grievant, and invited him to audition.

The grievant called the chairman of the committee and expressed his view that the committee's actions violated the Association's by-laws and the collective bargaining agreement, as

well as diminishing his standing with Macal. He urged the committee to reconvene and rescind its action.

On January 8th, the committee reconvened and rescinded its recommendation. The committee chairman informed Unkefer of the action later that same day. On the next day, the instant grievance was filed. The orchestra went ahead with an audition for the Acting Principal's position in April, under the terms of an interim agreement with the Association. The grievance was processed through the grievance procedure, but was not resolved.

Additional facts, as necessary, will be set forth below.

POSITIONS OF THE PARTIES

Position of the Association

The Association takes the position that the grievant has the contractual right and obligation to fill the Acting Principal French Horn position in the absence of the Principal. §7.5 of the collective bargaining agreement unambiguously provides that "during the absence of the Principal, the Associate and Assistant Principals will assume the duties of the Principal.." This language is mandatory and makes no provision for the use of an audition committee or any other device to defeat the rights of the Associate and Assistants. The Association's view of this language is confirmed by the fact that in three of the last four occasions on which a Principal took a year long leave. In the fourth case, the Associate agreed to allow the use of an audition procedure.

The Association notes that the MSO argues that audition committees have always been required to approve the move-up of Associates and Assistant, and dismisses this argument as specious. The only evidence was the uncorroborated testimony of former Personnel Manager Richard Pretat, who could only recall one such instance, and acknowledged that he was not present at the audition committee meeting. Two musicians who were present testified that the committee acted on the assumption that the move-up was automatic under the contract, and that the committee focused on finding a replacement for the Associate. Thus the only persuasive evidence of past practice demonstrates that the clear language of §7.5 is controlling and that the grievant was absolutely entitled to assume the Acting Principal's role.

The MSO's citation of §12.4 and 13.4 of the contract misconstrues those provisions. §12.4 refers to extras and substitutes, outside musicians who do not have contracts with the orchestra. The grievant is a contracted, titled player, and that provision of the contract is therefore inapplicable to this dispute. §13.4 speaks of using an audition procedure to fill vacancies caused by long term absences. This language is generic, in that applies to all such openings. The specific language of §7.5 governs vacancies in a Principal's position. §13.4 is applicable to the vacancy left after the Associate or Assistant moves up. This is precisely the procedure initially used by the Orchestra in this case, when the grievant was offered the opening

and an advertisement was placed announcing auditions for his position.

The audition committee convened in this case should not influence the outcome of the arbitration. The committee's composition was inconsistent with the make-up of past audition committees, and management's request that this committee express an opinion on which opening should be advertised was unprecedented. The grievant and the Association were kept in the dark about the committee's existence and purpose. The committee was never told that the grievant had already been offered the opening. In every respect, this committee lacked legitimacy under the contract and the prior understandings of the parties. Even if it had some sort of standing, the Association points out that it rescinded its vote after it had the opportunity to hear the grievant's concerns.

The Orchestra reneged on its commitment to the grievant, and in so doing it violated the labor agreement. The Association therefore requests that the grievant be awarded the position of Acting Principal French Horn and be made whole for his losses.

Position of the Employer

The Orchestra takes the position that it has the inherent right to make work assignments. This right is even more important here than in the usual case, since a world class orchestra requires that management be sensitive to artistic particularities in assigning work. Section 12.4 of the contract recognizes this in providing that the Music Director may insist on auditions when hiring for an extra or substitute position, and §13.4 reinforces this position by specifying the use of auditions to fill vacancies during leaves of absence. These audition procedures allow the affected musicians to have input to the Music Director's ultimate decision.

The audition procedure has been used on a regular basis for many years. The testimony of former Association official Rip Pretat, now Assistant Personnel Director and double bass player, confirmed that auditions are standard operating procedure where a player, titled or untitled, goes on a leave of absence. Pretat also testified that he was unaware, in his roles with the Association and with management, of any past practice of an automatic move-up of the Assistant or Associate to a temporary vacancy in the Principal's position. The language of the contract is clear, and reserves management's right to require auditions for vacancies.

The Orchestra had a legitimate concern about the grievant's ability to function in the Principal's position because of his commitments to the Grant Park Symphony. While a fine musician, the grievant may have been subject to burn-out, and this concern justified the Orchestra's decision to hold an audition. Artistic considerations are paramount in the operation of the Orchestra and the interpretation of the contract, and the Orchestra takes the position that the arbitrator must defer to management's judgment in those areas.

The Association's reliance on §7.5 ignores the actual language of that provision. The

grievant admitted that the first sentence did not apply to his situation, and instead cited the provision requiring that the Orchestra negotiate with the Assistant or Associate over additional compensation after the third week of their assumption of the Principal's duties. This section speaks to situations where the move-up has already been decided, and does not guarantee him any rights with respect to the initial decision. The Orchestra argues that no world class symphony would ever guarantee anyone a right to claim a vacant job, since the Associate is not assumed to be qualified for the Principal's role. Nothing in the contract supports the grievant's position, and it assumes that the parties entered into an agreement that is contrary to the artistic interests of the Orchestra.

The Association's citation of a supposed past practice is, the Orchestra argues, beside the point. Past practices may not modify clear contract language. In addition, to the extent that a practice exists, it supports the Orchestra's position. Audition committees have been used on a consistent basis, either to evaluate contending applicants or to offer comment on the Music Director's choice. Music Directors have chosen to move up Assistants or Associates quite often, which is not surprising. One would expect that internal harmony and familiarity with the symphony would lead to such decisions. In every case, however, it has been a choice by the Music Director rather than a contractual requirement. The evidence is simply insufficient to establish that the Orchestra for some reason gave up one of the most important and basic rights of management.

The Association's expansive view of §7.5 ignores the bargaining history behind that provision. Section 7.5 addresses compensation for Assistants and Associates when they are required to fill in for a Principal, and was negotiated in response to several situations where musicians were not compensated for those additional responsibilities. While the contract does contemplate an automatic hand off of the Principal's duties in emergency, short term situations, that is an obligation imposed on the Assistant and the Associate to assume those responsibilities, not a limitation on the Orchestra's right to assign work over the long term.

The Association's position would compromise the artistic integrity of the Orchestra, and is contrary to the clear language of the contract and the procedures used in past cases. For all of these reasons, the Orchestra asks that the grievance be denied.

DISCUSSION

The issue in this case is whether the contract requires the automatic advancement of the Associate to the Principal's position during a long term leave of absence. 1/ The Association argues that §7.5 of the contract mandates this result:

1/ The parties do not apparently disagree about what occurs during brief illnesses or short term leaves, and the analysis herein is expressly limited to long term leaves.

7.5 Move Up Premium Pay and Procedures. During the regular winter seasons, and *during the absence of the Principal, the Associate and Assistant Principals will assume the duties of the Principal* with no additional compensation for periods of three consecutive weeks or less. Upon completion of the three weeks, the Associate or Assistant Principal and management will negotiate an additional remuneration effective the fourth week of absence. (emphasis added).

Although this provision, on its face, appears more concerned with compensation than defining the right to move-up, the Association is correct that some of the language therein can be read as requiring the elevation of the Associate. If this were the only provision of the contract addressing the filling of vacancies, the Association's argument would have more persuasive weight. However, other provisions of the contract directly address leaves of absence and the procedures for filling vacancies.

Section 13.4 of the Agreement grants musicians the right to seek long term leaves, "subject to management's ability to find an acceptable replacement for the musician *through the auditions procedure. [Sec. 12.4].*" Section 12.4 requires auditions for substitute musicians at the beginning of each contract year, and dictates that, absent an emergency, substitute positions should be filled through these auditions. It goes on to provide that: "Regular auditions *shall be held for any extra or substitute position* at the request of the Music Director or Audition Committee of the section involved." A substitute musician is defined in Article 7.3 of the contract: "A substitute musician is a musician employed on a temporary basis to substitute for a musician who is on sick leave, military leave, *or other approved leave of absence.*"

In this case, Trevelt applied for a long term leave of absence under §13.4. By its terms, that provision contemplates the use of an audition procedure to replace the musician on leave. While the Association argues that the provision is intended only to apply to vacancies in untitled position, that interpretation is not reflected anywhere in Article 13. Section 13.4 itself refers to the absence of a Principal, limiting the availability of long term leaves to one Principal per year. This suggests that the parties fully contemplated the absence of a Principal when this provision of the labor agreement was negotiated, yet they made no move to exempt Principal positions from the mandate to use audition procedures for filling vacancies created by long term leaves.

The vacancy in the Principal's position was created by an approved leave of absence. Section 7.3 of the labor agreement defines those hired to fill in for such vacancies as "temporary musicians" and §12.4 requires that auditions be used for filling temporary positions where either the Music Director or the Audition Committee of the affected section so request. The distinction urged by the Association between titled and untitled positions is not irrational, but it is not expressed by the contract language. Given the elaborate procedures set forth for the filling of vacancies, the proposition that the parties would casually carve out the most important positions in the Orchestra for automatic progression using the indirect vehicle of the compensation provision of

§7.5 strikes the undersigned as highly improbable. Where such automatic succession is contemplated by the contract, it is done expressly. Section 12.2 speaks to vacancies during the summer season, and specifies that the Assistant Principal "will automatically assume a vacant Principal position." The parties are able to express themselves clearly on the question of automatic progression when that is their intent. No such clear statement exists on progression during the regular season.

Section 7.5 does contemplate the substitution of Assistants or Associates for the Principal. The history of this provision indicates that it was included in the contract in response to a situation where a musician was required to serve as a Principal with little notice and without compensation. The Orchestra's assertion that this is aimed at short-term leaves or illnesses where the Music Director requires the Assistant or Associate to fill-in is supported by the bargaining history, and an analysis of the contract language strongly favors management's arguments in this case. The limitation of §7.5 to short term vacancies is not, however, absolutely clear from a simple reading of the language. This particular provision is ambiguous in that sense, and there remains the Association's assertion that this language has been given controlling force over not only compensation but the right to claim a long term vacancy in the Principal's position through the past practice of the parties.

The Association has identified four instances in which a Principal was absent due to a long term leave or long term illness. In three of these instances, the Assistant moved into the position. In the remaining case, an audition was used to fill the vacancy, but the affected Assistant acquiesced in the decision and did not file a grievance. In one case where an Assistant moved into the Principal's position, his individual contract required that he be offered the position. In another, the Music Director determined to hire an outsider, and the Association threatened to grieve the matter. The parties expressed precisely the same positions that have been expressed in this case in their exchange of correspondence over the matter. In the end, the outside musician was not able to accept the appointment and the Assistant was offered the position. Given these distinguishing features, these three cases are not particularly useful as indicators of the mutual intent of the parties with respect to automatic move-up. The single remaining case where the Assistant was moved-up is not sufficient, in and of itself, to prove either party's position. In the normal course of events, one would expect that an Associate or Assistant Principal would be given serious consideration as the logical replacement for an absent Principal. As with many other citations to past practice, the significance of the event depends upon one's point of view, and each side looks at a non-controversial decision as an affirmation of inherent rights. Where the Assistant or Associate moves up, the management of the orchestra views it as the doing of Management's will, the result of a conscious choice by the Music Director to make that assignment. For their part, the players see it as an assignment dictated by the labor agreement, an admission that management had no other option. Since each party gets the outcome it seeks in these cases, they do little to define contractual rights.

The Association bears the burden of proof. While I do not question the sincerity of the

Association's position, the compensation procedures of §7.5 cannot overcome the clear language governing long term vacancies and auditions elsewhere in the labor agreement. The prior instances relied upon by the Association to demonstrate a binding past practice are for the most part factually distinguishable from this case, and do not in any event show a mutual understanding between the Orchestra and the players over the right to an automatic move-up during a long term leave by the Principal. For these reasons 2/, I have concluded that the grievant did not have the right to claim the Acting Principal French horn for the 1993-94 season and I therefore deny the grievance.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The Employer did not violate the collective bargaining agreement when it did not appoint David Babcock to the temporary long-term vacancy in the position of Principal French Horn for the 1993-94 season. The grievance is denied.

Signed this 14th day of March, 1994 at Racine, Wisconsin:

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

2/ Both parties have made arguments over the propriety of the Audition Committee's composition and actions in this case. This is a side issue with no bearing on the outcome of the case. In arriving at the decision herein, I have not attached any weight to the Committee's initial recommendation nor the subsequent rescission of that recommendation.