THE ORGANIZED MUSICIANS: I

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TRADE-UNIONISM, which found little favor among most other white-collar employments until the period of the last depression, got a substantial start among those employed in the entertainment industry a half century earlier. One of the oldest and strongest of the labor unions in that industry is the American Federation of Musicians. Yet, despite its long and active history, little was known of this organization outside its own trade circles until very recently. The man in the street had never heard of the Federation, and standard treatises on labor relations, keyed to the factory pattern, gave it scant acknowledgment.[1] Within the past few years, however, six congressional investigations and a considerable amount of other publicity have given us more information about the AFM—we now know that its President is James Caesar Petrillo, that he does not like phonograph records, and that the pundits of the press are quite uniformly agreed that his middle name is most appropriate. And on the basis of this information, many have reached the conclusion that Congress should "do something" about Petrillo and his organization.

It is the purpose of this article to undertake a somewhat more thorough study of the matter: to examine the history and the activities of the AFM in an attempt to discover how it functions, what its objectives are, to what extent its activities have been subjected to regulation, and to what extent those activities suggest the need for further governmental intervention.

FORMATION OF THE UNION

The history of organization among musicians in the United States covers a period of almost ninety years, beginning with the formation of the Aschenbroedel Club in New York City in 1860.[2] Social rather than business reasons inspired this organization and when, four years later, the Club was incorporated as the Musical Mutual Protective Union in order to

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[1] See, e.g., Stein and Davis, Labor Problems in America (1947); Daugherty, Labor Problems in American Industry (5th ed., 1941).

[2] Commons, Types of American Labor Unions—The Musicians of St. Louis and New York, 20 Q.J. Econ. 419, 424 n. 1 (1906), revised and reprinted in Commons, Labor and Administration 217 (1913).

facilitate the acquisition of a club building, the incorporating Act defined the purposes of its founders to be "the cultivation of the art of music in all its branches, and the promotion of good feeling and friendly intercourse among the members of the profession, and the relief of such of their members as shall be unfortunate. . . ."[3]

Members of the MMPU soon discovered, however, that their mutuality of interest extended beyond cultivation of the art and of good fellowship and included also a common concern in problems of employment. To bring the strength of their organization to bear on these problems, they obtained an amendment to the charter which added to the objectives of the MMPU "the establishment of a uniform rate of prices to be charged by members of said society, and the enforcement of good faith and fair dealing between its members."[4] Thus armed, MMPU proceeded to prescribe the prices to be charged by its members for all professional engagements. And, to encourage non-affiliated musicians to join the society and thus bring themselves under the price schedules, rules were adopted making it a "breach of good faith and fair dealing," punishable by fine or expulsion, for a member to perform in any band or orchestra where non-members were also performing.[5] MMPU thus became a business organization as well as a fraternal society. But no right-thinking member would have seen any similarity between its function and that of a labor union. Musicians were not "laborers"—they were "artists."

Musicians in other cities soon followed the New York example. The St. Louis Aschenbroedel Club was organized in 1864 and the St. Louis Musicians' Mutual Benefit Association a year later. The New York pattern was varied somewhat in an attempt to guard against judicial interference with disciplinary activities of the Association.[6] The Aschenbroedel Club was incorporated to hold title to the club building, and the MMBA, which promulgated and enforced rules fixing prices and forbidding performance

[3] N.Y.L. (1864) c. 168, § 2.

[4] N.Y.L. (1878) c. 321, § 1. The amendment expressly provided: "It shall be lawful for said society . . . to fix and prescribe uniform rates of prices to be charged by members of said society for their professional services. . . . And any member of said society violating any . . . by-law may be expelled from said society. . . ."

[5] For an unsuccessful attempt to enjoin enforcement of these rules, see Thomas v. MMPU, 121 N.Y. 45, 24 N.E. 24 (1890).

[6] In a number of New York cases expelled members secured writs of mandamus to compel reinstatement and money judgments for damages because the courts disagreed with MMPU on the interpretation of its by-laws. People ex rel. Merscheim v. MMPU, 47 Hun. (N.Y.) 273 (1888); People ex rel. Deverell v. MMPU, 118 N.Y. 101, 23 N.E. 129 (1889); Merscheim v. MMPU, 55 Hun. (N.Y.) 608, 8 N.Y. Supp. 702 (1890); Schrader v. MMPU, 55 Hun. (N.Y.) 608, 8 N.Y. Supp. 706 (1890); Saase v. MMPU, 55 Hun. (N.Y.) 608, 8 N.Y. Supp. 933 (1890).

with non-members, was organized as an unincorporated association.[7] Other mutual benefit societies followed. Either as incorporated bodies or as unincorporated associations, they were formed throughout the United States. And each of them set up a scale of minimum prices and forbade its members to perform with non-members.

In 1886 some of these societies joined in the formation of the National League of Musicians, and within ten years the membership of the League included 101 local societies. Affiliation with the League did not, however, affect the functions of the local bodies. While the League was formed to deal with problems common to all the societies—and did present their complaints against the importation of foreign musicians to the immigration authorities and their protests against competition from military bands to the War and Navy departments—it had no power to prescribe rules binding upon the Locals, and they retained complete authority to adopt and enforce their own policies on membership, prices, benefit plans, etc.

One matter, though, the national organization did control: the question of affiliation of the League with a trade-union organization. From its inception the League had received numerous invitations to affiliate from both the Knights of Labor and the American Federation of Labor. Many of the young western societies, led by the St. Louis organization, favored affiliation with the AFL, but the older eastern societies, still bemused by the artist-laborer dichotomy, shunned any association with a trade-union. Because these older societies were also the largest and were favored both by the rule that each society should have one vote in the League convention for every 100 members and by a proxy system which allowed them to vote for smaller societies who could not afford to send delegates to the convention, the AFL's periodic invitations were regularly rejected.

The AFL countered by organizing several musicians' unions of its own, and in 1896 extended an invitation to all musicians' organizations to meet at Indianapolis and form a new national organization. At this convention, attended by 19 societies of the League and 5 AFL unions, the American Federation of Musicians was formed as a national[8] federation affiliated with the AFL.

The League's retaliatory policy of expelling every Local which affili-

[7] Commons, op. cit. supra note 2, at 423. The fears of the St. Louis Association proved groundless, however. In Froelich v. MMBA, 93 Mo. App. 383 (1902), an expelled musician was refused judicial assistance in regaining his membership on the ground that the Association was a combination in restraint of trade.

[8] In 1900 the AFM expanded its jurisdiction to include Canadian musicians and thus, in trade-union parlance, became an "international" federation.

ated with the AFM[9] resulted by 1902 in reducing the League to a total of three locals, while the AFM, in addition to acquiring 98 former League affiliates, had 99 additional unions of its own, including competing Locals in the home cities of the three League hold-outs—New York, Philadelphia, and Baltimore.

Finally, in 1903, an understanding was worked out whereby the New York MMPU agreed, after receiving assurances that some measure of local independence would be retained and that its corporate identity would be preserved, to merge with the AFM's New York Local.[10] The Baltimore MMPU and the Philadelphia Musical Association capitulated immediately afterward, and the Federation, claiming over 30,000 members, could then boast that it represented 80% of the professional musicians in the United States.[11]

STRUCTURE AND POWERS OF THE FEDERATION

The musicians who formed the AFM had learned that little could be done to further their interests merely by bringing delegates from local societies together once a year in a national convention to discuss their problems. Some sort of central authority, with power to enact rules binding on the Locals and with further power to act between conventions, was necessary. But they had also learned, in the course of their campaign to bring about affiliation with the AFL, that some measures must be taken to insure representation of all local interests in the national organization. Consequently, the Constitution and By-Laws of the AFM reflect an attempt to strike a compromise between adequate national authority and effective local representation.

Legislative powers are exercised, and national officers[12] are elected for one-year terms by the national convention, which is required to meet annually.[13] In this convention, each Local has one vote for each 100 members

[9] Local League societies also expelled members who tried to maintain membership in both League and AFM Locals. See Weiss v. MMPU, 189 Pa. 446, 42 Atl. 118 (1899). AFM policy was to require Locals chartered by it in jurisdictions already occupied by a League society to grant AFM membership at a nominal initiation fee to the entire body of the League society. See O'Brien v. Musical Mutual Protective & Benevolent Union, 64 N.J. Eq. 525, 54 Atl. 150 (1903).

[10] See Fuerst v. MMPU, 95 N.Y. Supp. 155 (1905). Similar concessions were made to induce a number of other League societies to affiliate with the Federation, and many AFM Locals are still incorporated.

[11] International Musician 13 (Aug. 1903).

[12] A President, Vice-President, Secretary, and Secretary-Treasurer, plus an Executive Board made up of these officers together with five members elected at large, at least one of whom must be a resident of Canada. AFM Const. Art. VIII (1947).

[13] Ibid., Art. IV. This mandate has been faithfully observed, save for the years 1943 and 1945 when, with prior authorization from the 1942 convention, national officers canceled the conventions because of the war-time transportation shortage.

subject, originally, to a maximum of ten votes for any one Local. Of course, this limitation pleased all but the Locals limited by it, the chief objector being the largest Local—New York's No. 310. In 1906 the New York objections culminated in a proposal to eliminate the ten-vote rule, but the convention, after listening to President Weber's reminder of the control exercised in the old National League by a few large Locals, adopted a compromise provision—still in effect—under which the ten-vote rule is retained for the election of officers but may be lifted on demand of ten delegates or five Locals in the enactment of laws, all laws so enacted to be subject to veto by a committee consisting of the Executive Board and the chairmen of all other national committees.[14]

In the interim between conventions, the President of the Federation was originally given authority to "decide cases of an emergency" and, subject to this power, the national Executive Board was authorized to legislate in emergencies. The 1911 convention adopted President Weber's suggestion that the By-Laws be amended "for a clearer understanding of the existing laws"[15] to authorize the President to issue "executive orders binding upon all members and Locals if, in his opinion, the enforcement of the Constitution and By-Laws and Standing Resolutions of the Federation make such course necessary." As again amended a few years later and finally revised in 1930, this provision now authorizes the President also to "annul and set aside" the Constitution, By-Laws, and Standing Resolutions "and substitute therefor other and different provisions of his own making" whenever in his opinion such action is necessary "to conserve and safeguard the interests of the Federation, the Locals and/or members,"[16] and the powers of the Executive Board have also been expanded, though to a lesser extent.[17]

Theoretically, these provisions give the President and the Executive Board unlimited power to determine policies of the organization, and critics of the union point to them as evidence of "dictatorship." But, at least in the last decade, there have been only two instances of the use of those powers, neither of which was of a sort to occasion alarm.[18] And since

[14] AFM Const. Art. V (1947).

[15] International Musician 5 (June 1911).

[16] AFM By-Laws Art. I, § 1 (1947).

[17] "Matters not covered by the Constitution or By-Laws shall be in the discretion of the Executive Board, which Board shall have power to adopt such rules, supplementing said Constitution and By-Laws, or covering any matter not contained therein, as it may deem proper, in adddition to determining and announcing the policies of the Federation, all of which rules, matters and policies shall have equal force and effect with the Constitution and By-Laws." AFM By-Laws Art. I, § 6-A (1947).

[18] Early in 1942 Petrillo set aside an obviously out-dated By-Law providing for termination of membership of any musician who entered the military service and substituted a rule saving

the Standing Resolutions, By-Laws, and even the provisions of the Constitution can be amended or repealed by a majority vote of the annual convention,[19] the extent of authority delegated to the Federation is always within the discretion of the convention. The tendency, however, has been toward constantly increasing the powers of the national body.

The original By-Laws provided that the Federation should not "enact any law or measure of a general and universal death benefit or insurance assessment nature,"[20] and control over all benefit plans is still left with the Locals. Originally, too, no power to negotiate wage scales was given to the national officers, and, with some rather large exceptions to be noted later, that is still the practice.

It is with respect to qualifications for membership that the Federation imposes the greatest limitations upon local autonomy. At the outset, the Federation sought to organize all who worked professionally as instrumental musicians; subsequently, it extended its jurisdiction to include those working as copyists, arrangers, music librarians,[21] and conductors.[22] Since anyone who performs in any of these capacities for hire is a potential threat to the wage standards which the AFM sets for its members, and since the power of the Federation to set those standards depends upon the extent to which it represents such performers, the AFM is interested in bringing all of them into its Locals. For trade-union purposes, their skill as musicians is not nearly as important as their ability to secure employment as musicians—if they are skilful enough to do that, protection of the AFM's other members demands that they become members also. Consequently, while it was the artist who inserted in the original By-Laws a rule that all applicants for membership should be tested by an Examining Board appointed in each Local,[23] it was the trade-unionist who inserted another providing that "[p]erformers on musical instruments of any kind who render musical services for pay are classed as professional musicians and are eligible for membership, subject to the laws and jurisdiction of the A.F. of M.,"[24] and backed it up with a provision that "[a]ny Local law prohibiting the admission of any competent musician, male or female"

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the membership and relieving the musician of dues and assessments during his military service. AFM By-Laws Art. X, § 4 (1947). Later in the same year, as part of a successful campaign to induce the Boston Symphony Orchestra to abandon a sixty-year open shop policy and sign a union contract, he set aside a By-Law to which the Boston organization objected, which forbade the importation of symphony musicians from the jurisdiction of another Local without the consent of such Local.

[19] AFM By-Laws Art. XVII, § 1 (1947).

[20] International Musician 6 (July 1903).

[21] AFM Const. Art. III, § 1 (1947).

[22] AFM By-Laws Art. X, Preamble A (1947).

[23] Ibid., Art. IX, § 6.

[24] Ibid., Art. XV, § 1.

over the age of 16, should be void.[25] While the Examining Boards have some discretion in passing on the "competence" of the applicant, as a matter of practice any musician who has demonstrated that he is competent to secure a paid engagement is eligible for membership.[26]

There are no racial barriers to membership, although the AFM is one of a diminishing number of labor unions[27] which restricts Negroes to Jim Crow Locals. Citizenship is not a prerequisite, but an alien applicant for membership must have taken out his first papers and after admission must complete his naturalization "within the shortest possible time provided by law."[28] Since 1940 the national By-Laws have directed all Locals to expel Communists and Fascists, but this provision seems to have been the product of war-time exhilaration rather than of contamination in the membership.[29] There are no rules designed to limit membership—the AFM is an "open union."

Keeping the Locals "open" was not enough, however, to remove all local obstacles to affiliation. A member might change his residence from the jurisdiction of his own Local to that of another—those who worked full-time as musicians frequently did. Such a member, having once paid an initiation fee to one Local in order to become an AFM member, was not enthusiastic about paying another initiation fee simply to retain that membership, especially if he had not yet determined whether he would be able to make a living in the new locality. Moreover, he might have some interest in the benefit plans of his original Local which he wanted to retain. Members of the second Local, on the other hand, frequently did not welcome new competition and were not at all disposed to waive their initiation fee in order to clear the way for it. Certainly they would not waive

[25] Ibid., Art. IX, § 15.

[26] Still accurate is President Weber's 1904 description of the membership policy: "The A. F. of M. is a unique organization; it does not only represent those that follow Music exclusively for a livelihood, but it represents also those who do not even in a major part depend upon Music for their maintenance. It follows, therefore, that every Instrumental Performer receiving remuneration for his services is eligible for membership." International Musician 1 (June 1904).

[27] See Summers, Admission Policies of Labor Unions, 61 Q. J. Econ. 66, 68–72 (1946).

[28] AFM By-Laws Art. IX, § 9 (1947).

[29] Ibid., §§ 9–11. Even the House Committee on Un-American Activities would have difficulty finding cause for alarm in the AFM unless it be in the fact that the only AFM officials to file the non-Communist affidavits required by § 9(h) of the Taft-Hartley Act are the officers of West Palm Beach Local 806. Letter from Jay Shanklin, Assistant Director of Information, National Labor Relations Board, June 8, 1948. But, aside from matters of principle, this ommission is quite probably due to the improbability of the AFM ever having occasion to resort to the representation and complaint proceedings for which such filing is a prerequisite, as well as to the Federation's hostility to the Taft-Hartley Act in other respects.

that fee where membership in their Local also included rights under benefit plans.

To meet this problem, the 1902 convention adopted a "universal membership law," under the provisions of which any musician who has been a member of one Local for six months may, upon moving into the jurisdiction of another, take out a transfer card which when deposited with the second Local together with payment of current dues entitles him to limited performing rights in the new jurisdiction for a period of six months.[30] At the end of that time, he must pay the local initiation fee and become a full member. Until he has paid that fee, the transfer member is not entitled to vote, hold office, or share in the benefit plans of the second Local, but that Local may not refuse him full membership upon tender of the initiation fee at the expiration of the six month period. The musician need not forfeit membership in his original Local upon becoming a member of a second, if he is willing to pay the dues and assessments of both.[31]

When some of the Locals reacted to this rule by increasing their initiation fees, the Federation moved to limit local powers in that field also.[32] In this endeavor it was somewhat embarrassed by promises made to some of the former League societies at the time of their transfer to the AFM guaranteeing that there would be no interference with their initiation fees; but, after President Weber had construed this promise to apply only to the Local fee existing at the time the promise was made and not to any subsequent increase, the 1912 convention adopted a $50 maximum for Local initiation fees, accommodating those Locals whose fees exceeded that amount at the time the promise of non-interference was made by a proviso that enforcement of the limitation should be left to the discretion of the Executive Board.[33]

This limitation on initiation fees is but one manifestation of a fiscal pol-

[30] "[W]here a Local maintains a law defining a steady engagement as one consisting of three or more days per week, for one particular employer, for two or more consecutive weeks, then transfer members . . . cannot, without the consent of the Local, accept such steady engagement . . . for a period of three months from date of depositing transfer card. . . ." AFM By-Laws Art. XII, § 4-H (1947). An attempt of the Boston Local to enforce this provision against a transfer orchestra leader by refusing to allow Local members to perform with him in a radio station orchestra was enjoined in a suit brought by the operator of the radio station in Yankee Network v. Gibbs, 295 Mass. 56, 3 N.E. 2d 228 (1936).

[31] AFM By-Laws Art. XII, § 8 (1947).

[32] From the beginning the Federation had required a $5 minimum initiation fee. AFM By-Laws Art. III, § 4 (1947). In 1905 the AFM membership, on referendum vote, rejected a proposal to eliminate all initiation fees for transfer members.

[33] AFM By-Laws Art. IX, Preamble A (1947). The Executive Board is also authorized to "determine whether or not members paying such a fee shall be entitled to the benevolent and property rights of the Local which they join, provided Locals which grant such benevolent and property rights heretofore maintained an initiation fee exceeding $50.00."

icy calculated to encourage union affiliation. Although the Federation has never found it necessary to impose a similar limitation on Local dues, those charges average only $8 to $10 a year and do not exceed $20 in any instance. National dues consist of a per capita tax of $1.25 per year paid by the Local.[34] These charges, however, constitute a minor source of revenue. The principal income of both the Locals and the Federation is derived from taxes upon the earnings of employed members. The musician employed in making sound pictures pays a 1% tax into the National Theater Defense Fund.[35] Traveling bands and orchestras pay a 10% tax, of which 40% goes to the Local in whose jurisdiction the engagement is played, 30% goes to the Federation, and 30% is returned to the members who played the engagement,[36] except when such traveling bands play radio engagements, in which case the tax is 15% and is allocated 80% to the Federation and 20% to the Local in whose jurisdiction the engagement is played.[37] In addition to these taxes, all of which are imposed by national rules, the Locals are authorized to assess additional taxes, not to exceed 4%, on any engagements for which the national rules prescribe no tax.[38]

The Federation also exercises an appellate supervision over Local action in expelling members for nonpayment of dues and assessments or for violation of union rules. Any member so expelled may get a stay of judgment from the national President and may have his case reviewed by the Executive Board, with a further right of appeal to the national convention.[39] Although most expulsion proceedings originate at the local level, the Executive Board is also authorized to act in the first instance to expel any 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."[40]

In addition to the powers vested in the Federation with respect to expulsion of members, the national President or the Executive Board is empowered to suspend or remove from office any Local officers found guilty of "neglect of duty, interference with or violation of any of the provisions of

[34] AFM By-Laws Art. III, §§ 6, 7 (1947). Thirty cents of this tax represents the subscription price for the International Musician.

[35] AFM By-Laws Art. III, § 11-A (1947).

[36] Ibid., Art. XIII, Preambles A, H.

[37] Ibid., Art. X, § 2-D.

[38] Except that Locals are forbidden to tax recording engagements played by traveling orchestras. AFM By-Laws Art. IX, § 38 (1947).

[39] Ibid., Art. XI, Preamble A, § 12. The complaining party also has a right of appeal from a Local decision in favor of an accused member. See Gorden v. Tomei, 144 Pa. Super. 449, 19 A. 2d 588 (1941); Rubens v. Weber, 237 App. Div. 15, 260 N.Y. Supp. 701 (1930).

[40] AFM By-Laws Art. X, Preamble A (1947). No provision is made for hearing or appeal, although as a matter of practice a hearing before the Executive Board is accorded.

the Constitution, By-Laws, Standing Resolutions, orders or directions of the Convention, the President or the Executive Board . . . or of any of the purposes, objects or affairs of the Federation."[41] Further, the Executive Board is authorized to expel any Local for "violating or failing to comply with any provision of the Constitution . . . , By-Laws . . . , Standing or Special Resolutions or directions of any Convention or any order, direction or verdict of the Executive Board . . . or any duly authorized officer of the Federation. . . ."[42]

The respective powers of the Federation and the Locals in the matter of expulsion of members, Local officers, and Locals were tested in a series of battles in the New York courts which arose out of the only serious revolt provoked by the Federation's limitations upon local autonomy.

The conflict began in 1920[43] when Local 310 and the managers of New York vaudeville houses reached an impasse on the Local's demands for a 50% wage increase. Pursuant to the national By-Laws, the managers appealed to the Federation[44] and the national officers, with the assistance of Local President Finkelstein, negotiated a 40% increase which was ratified by the members of the Local over the protests of a majority of its Board of Directors. Shortly thereafter the Board of Directors preferred charges against Finkelstein (refusal to consider motions properly put at Directors' meetings, execution of pay warrants for a sergeant-at-arms whose appointment the Board had refused to confirm, etc.) and suspended him from office pending trial—all in accordance with Local by-laws. Finkelstein appealed to President Weber, who invoked his emergency powers and ordered the Directors to stay their proceedings. When they disregarded this order, he issued another expelling them from the Local. The Directors then applied to the courts for an injunction against enforcement of the expulsion order and got it on two grounds: 1) Since Local 310 was also the Musical Mutual Protective Union, a New York corporation, its internal

[41] AFM By-Laws Art. I, § 1 (1947). No provision is made for hearing or appeal.

[42] AFM By-Laws Art. IV, § 2 (1947). The Executive Board must try the case "either (1) by the production of witnesses and the taking of testimony before it, or (2) the submission . . . of affidavits or other written proof or documents in support and in defense of such charges." Ibid., Art. IV, § 6. No provision is made for appeal.

[43] Some local resentment was generated earlier when the national officers in August 1919 called the New York musicians out of the legitimate theaters in support of the Actors' Equity strike for recognition and a standard contract. Harding, The Revolt of the Actors 141–43 (1929); Gemmill, Collective Bargaining by Actors 11–12 (1926).

[44] "The appeal of an employer is considered an affair of the Federation, and therefore the Convention, the International Executive Board or the President of the Federation, as the case may be, may assume the same jurisdiction in such appeal as they exercise in all other cases properly coming before them under the laws of the Federation." AFM By-Laws Art. XI, Preamble F (1947).

affairs were governed by New York law. That law authorized the union to promulgate by-laws, and under those by-laws there was no cause for expulsion of the Directors, regardless of what the rules of the AFM might provide. 2) In any event, the powers conferred on the national President by AFM By-Laws would not be construed to include the power to expel Local Directors without hearing.[45]

This might have ended the dispute had not the Local Directors chosen this occasion to raise another issue. Local 310, exercising jurisdiction over what was then the Mecca for all aspiring musicians, was the chief recipient of transfer cards, and its compliance with the universal membership law had always been grudging. Now the already disgruntled Board of Directors refused to honor a number of transfer cards presented to it. After notice and opportunity for hearing, the AFM Executive Board expelled the Local for this violation of AFM By-Laws and created Local 802 to replace it. When the officers of Local 310 again sought judicial relief they were unsuccessful—the New York corporation laws did not apply to the Local's affiliation with the AFM and the expulsion procedure was in strict compliance with AFM rules.[46] MMPU attempted for a time to function as an independent union in competition with new AFM Local 802, but New York theater managers proved eager to co-operate with the AFM by abrogating their contracts with MMPU,[47] and its members soon found it expedient to join the new Local. MMPU now exists solely for the purpose of renting the building owned by it.[48]

But peace did not return to New York with this victory over MMPU. In creating Local 802, the national officers had provided in its by-laws for a governing board, all members of which were to be selected by the AFM Executive Board, and had further provided that the by-laws could be amended only with the consent of that Board. When thirteen years of agitation resulted only in a concession allowing local election of a minority of the governing board, the membership of the Local in 1934 adopted resolutions providing for a special meeting to adopt new by-laws regardless of national approval and for a special election to select a full governing board. When certain members went forward with arrangements to

[45] Kunze v. Weber, 197 App. Div. 319, 188 N.Y. Supp. 644 (1921); see also Werner v. Weber, 197 App. Div. 326, 188 N.Y. Supp. 648 (1921).

[46] MMPU v. Weber, 123 N.Y. Misc. 182, 205 N.Y. Supp. 599 (1924), aff'd 245 N.Y. 626, 157 N.E. 885 (1927); see also Taussig v. Weber, 123 N.Y. Misc. 180, 205 N.Y. Supp. 605 (1924).

[47] Langley, The Musician: Artist and Laborer, 113 Nation 262 (Sept. 7, 1921).

[48] In order to induce Local 802 to rent the building in 1930, MMPU was forced to secure an amendment to its charter, changing its name to Musical Mutual Corporation and eliminating its powers to fix prices for musical engagements and to prescribe rules of "good faith and fair dealing" between members. N.Y.L. (1930) c. 563.

carry out these resolutions, they were fined by the Local for violation of Local by-laws, expelled for failure to pay the fine, and fined by the AFM Executive Board for "placing obstacles in the way of the successful maintenance of Local #802" and expelled for failure to pay that fine.

Nonetheless, and probably in part because members of Local 802 took their complaint to the Copeland Committee which was then investigating "racketeering,"[49] the Federation granted the Local authority to elect all officers except the chairman of the governing board, who was to be selected by the AFM Executive Board for an additional two years. And when, in actions brought by the expelled members, the New York Supreme Court granted temporary restraining orders accompanied by opinions indicating that it entertained serious doubts as to whether there had been any violation of the national By-Laws and as to the fairness of the expulsion procedure followed by both the Local and the Federation,[50] the expelled members were reinstated and the Local was authorized to elect its own chairman also. With this capitulation by the Federation, Local 802 acquired the same independence in the conduct of its internal affairs as is enjoyed by all other AFM Locals.

But the independence of all Locals has given way to the necessity for national control in other areas. One problem which the Locals were not competent to handle was that of traveling bands. Each Local wanted its own members protected against underbidding by such bands but had no authority to discipline traveling musicians who belonged to other Locals. On the other hand, the traveling bands frequently were not content with the wage scale prevailing in the various communities in which they appeared, but their own Locals could not aid them in their dealings with employers in other jurisdictions. Accordingly, the 1904 convention adopted an elaborate schedule of prices to be charged by traveling bands for various types of engagements (subject in all instances to a higher Local scale in the jurisdiction where the engagement was performed), and control over such prices has been exercised by the national convention since that time.[51]

[49] Hearings before Subcommittee of Committee on Commerce pursuant to S. Res. 74, 73d Cong. 2d Sess., Vol. II, at 1–125 (1934).

[50] Koukly v. Canavan, 154 N.Y. Misc. 343, 277 N.Y. Supp. 28 (1935); Koukly v. Weber, 154 N.Y. Misc. 659, 277 N.Y. Supp. 39 (1935).

[51] Current prices for traveling bands and orchestras are set out in AFM By-Laws Arts. XIII and XIV (1947). Members who violate these price schedules may be tried by the Local in whose jurisdiction the violation occurred, or by the national Executive Board, or by a Traveling Committee consisting of three members of the Executive Board. If the penalty imposed is a fine of $500 or more, or expulsion from the union, an appeal may be carried to the national convention. Ibid., Art. XI, § 3-A. See Fales v. Musicians' Protective Union, 40 R.I. 34, 99 Atl. 823 (1917).

Further national supervision of the engagements of individual members was secured in 1936 when the convention adopted a system of licensing for booking agencies. Since 1913 the By-Laws have forbidden AFM members to enter employment relations except through "contractors,"[52] who are also AFM members, but the contractor is merely one of the musicians—usually the orchestra leader—who represents the orchestra in all dealings with the employer after an engagement is secured.[53] At least in the case of the "name bands" the contractor does not secure the engagements. That function is discharged by the same booking agencies who handle engagements for others in the entertainment field. Because some of these agencies had been guilty of abuses common to private employment offices, and because the Supreme Court had decided that such agencies were not subject to state regulation,[54] Actors' Equity Association had in 1928 adopted a plan requiring booking agencies representing its members to operate under a license issued by the Association, the license providing for more favorable terms for the actors than had previously prevailed in contracts between actor and agency. After this plan had been tested in practice and in court,[55] the AFM adopted it also. Under the AFM version, members are forbidden to do business with an agent not licensed by the national Executive Board, and the license is terminable at will by the Board. Under the terms of the license, the agent agrees to act for no musician not affiliated with the AFM, to secure engagements on terms conforming to AFM rules and wage scales, to receive no payment for his services until the musicians have been paid, and to guarantee their payment.[56] Moreover, any contract he may make with AFM members must provide for cancellation if he fails to secure for them at least forty weeks' employment per year.[57]

The AFM also attempts, by ad hoc action, to protect local musicians from too much competition from traveling bands. See Eddyside Co. v. Seibel, 142 Pa. Super. 174, 15 A. 2d 691 (1940).

[52] AFM By-Laws Art. X, § 29 (1947).

[53] For social security tax purposes the leader-contractor rather than the proprietor of the establishment where the engagement is played may be the "employer"—despite the best efforts of the AFM to avoid that result by contract. Bartels v. Birmingham, 332 U.S. 126 (1947); Establishment of Employment Relationships by Collective Agreement, 15 Univ. Chi. L. Rev. 716 (1948).

[54] Ribnik v. McBride, 277 U.S. 350 (1928).

[55] Edelstein v. Gillmore, 35 F. 2d 723 (C.C.A. 2d, 1929), cert. den. 280 U.S. 607 (1930).

[56] AFM Standing Resolution No. 51 (1947). The requirement that the agent guarantee payment on all engagements was added last year. Previously the agent had been required to guarantee the price of all single engagements booked with an employer "not regularly engaged in the business of employing musicians." The 1947 change produced such strong protests from the booking agencies that the AFM Executive Board recently agreed to enforce it only where the Board finds that the agent was "negligent" in booking the engagement. Variety, p. 26 (Feb. 4, 1948).

[57] AFM By-Laws Art. X, § 54 (1947).

It is in matters of membership, traveling bands, and booking agencies that the Federation has exercised the greatest control throughout the entire entertainment industry. In certain branches of that industry, national control has been extended even further, but those developments will be considered in connection with the problems which inspired national action.

EXTENT OF UNIONIZATION

The AFM has been able to enforce its booking agency license requirements and its price scales on traveling bands for the same reason that it has been able to maintain closed shop conditions in practically all situations (with or without written agreements) for the last thirty years.[58] Virtually all musicians in the United States who play for hire are members of the AFM.

This situation did not follow immediately upon the creation of the Federation. That event presaged the end of organized opposition to affiliation with a trade-union, but it did not at once determine that the AFL should be the trade-union with which all musicians' organizations would affiliate. Shortly after dissolution of the National League, the near-defunct American Labor Union launched a campaign to organize musicians through its International Musical Union, and the expiring Knights of Labor set out to muster new support for its cause in the musical field. At the same time, an independent American Musicians' Union, aided by an Illinois court's injunction against AFM interference,[59] was giving AFM Local 10 a stiff battle in Chicago.

These competing organizations achieved their greatest strength in 1909 when, claiming an aggregate membership of 20,000, they joined forces to form the American International Musical and Theatrical Association.[60] This Association lasted about six years, but the AFM's supremacy was never seriously jeopardized. It entered the contest with 56,000 members, Locals in 500 cities and towns, and a strong national organization. In 1913 it gained additional strength by forming a mutual assistance pact with the stagehands' International Alliance of Theatrical Stage Employees, whereby either union could, if involved in a dispute with an employer, require the other to call its members out on sympathy strike.[61] A year later

[58] For an early example of closed shop conditions secured by organization rather than by contract, see Rhodes Bros. Co. v. Musicians' Protective Union, 37 R.I. 281, 92 Atl. 641 (1915).

[59] See American Musicians' Union v. Chicago Federation of Musicians, 184 Ill. App. 444 (1913).

[60] New York Times, p. 3 (April 13, 1909).

[61] Baker, The Theatrical Stage Employees and Motion Picture Machine Operators Union 78 (1933).

the AFM adopted a policy of enforcing "closed shop conditions when and wherever consistent"[62] and by 1915 the opposition was sufficiently reduced so that that policy could be "consistently" enforced almost everywhere. The American Musicians' Union retained some strength in Chicago for a few years thereafter but subsided into inactivity shortly after the former President of its Chicago Local, one James C. Petrillo, left its ranks in 1917 to join AFM Local 10,[63] and the AMU was finally absorbed by Local 10 in 1937.

The Federation's only other battle for control of musicians took place within the AFL family.[64] Although the AFM had always claimed jurisdiction over grand opera and symphony orchestras,[65] it had not attempted, prior to 1940, to organize solo instrumentalists, accompanists, and conductors performing with such orchestras. Such performers were not easily converted to trade-unionism and even if unaffiliated they constituted no serious threat to union standards. But in 1936 Lawrence Tibbett and others formed the American Guild of Musical Artists, with membership open to singers, ballet dancers, choreographers, solo instrumentalists, conductors and accompanists in grand opera and concert work. The Guild succeeded in enlisting a considerable number of instrumentalists and conductors, and in 1937 it affiliated with Associated Actors and Artists of America, the parent body to which all AFL entertainers' organizations other than the AFM and the recently chartered Radio Directors' Guild belong. While the Federation was willing to leave these performers unorganized, it was not willing to have them represented by another union. Accordingly, in 1940 it notified the Guild, the booking agencies, and the employers of such performers that AFM members would not perform with any accompanist, instrumental soloist, or conductor who was not an AFM member. But when the Department of Justice threatened an anti-trust investigation[66] and the Guild persuaded the New York Court of Appeals that its complaint, setting out the above facts, stated a proper case for injunction despite the provisions of New York's anti-injunction statute,[67] a com-

[62] AFM By-Laws Art. IX, § 23 (1947).

[63] In 1922 Petrillo became president of Local 10, a position which he still holds.

[64] The CIO got nowhere in its 1937 attempt to recruit all types of theater workers, including musicians, into a "United Theatrical and Motion Picture Workers' Union," although its tender of a charter to the old American Musicians' Union in Chicago did inspire AFM Local 10 to bring the AMU remnants into its ranks.

[65] For some indication of the achievements of AFM Locals in attempting to secure higher wages for members of such orchestras, see Grant and Hettinger, American Symphony Orchestras 101–9 (1940).

[66] New York Times, p. 7 (March 1, 1941).

[67] American Guild of Musical Artists v. Petrillo, 286 N.Y. 226, 36 N.E. 2d 123 (1941).

promise was reached whereby the Guild relinquished all claim to jurisdiction over conductors and accompanists, and the AFM agreed that the Guild should be the exclusive bargaining representative for instrumental soloists in the concert and opera fields—although soloists were required to hold membership in the AFM as well as in the Guild.

The effect of this settlement was to bring into the AFM the only substantial body of instrumental musicians not previously organized. There remained only one obstacle to virtually complete coverage—the Boston Symphony Orchestra still adhered to its traditional open-shop policy. But the AFM had addressed itself to that problem in 1940 by threatening to call its members out of any recording or broadcasting studio where the Orchestra was engaged, and after two years without broadcasting and recording fees the Boston organization capitulated.

Thus, by 1943 the AFM had practically every professional instrumental performer and conductor in the United States enrolled as a member. According to the Federation's count, its membership now totals 232,000. With adjustments to eliminate 10,000 Canadian members and to allow for duplicate memberships, there are probably about 200,000 members in the United States, 25% of whom are in three of the 730 Locals—28,000 in New York, 13,500 in Los Angeles, and 11,000 in Chicago.[68]

OBJECTIVES OF THE FEDERATION

Since his occupation is almost completely free from physical hazards, the musician has little interest in workmen's compensation laws and safety legislation.[69] In most cases his employment is too transitory for him to be greatly concerned about such matters as working conditions, seniority arrangements, and vacations. Since it is a rare engagement which calls for more than four hours of performance, he has no need of maximum-hours legislation. For the same reason, minimum wage legislation geared to the eight-hour day is of no value to him. And his union was so strong and so well organized by 1935 that it has had no occasion to invoke the certifica-

[68] International Musician 9 (June 1948); Hearings before Special Subcommittee of Committee on Education and Labor pursuant to H. Res. 111, 80th Cong. 1st Sess., at 191, 292, 381–82 (1947).

[69] Workmen's compensation statutes may become a matter of vital concern to the occasional musician who is injured on the job, and whose right to recover damages in a tort action or compensation under the statute may depend upon whether or not he is an "employee" of the proprietor of the place where the engagement was being played. And the determination of that point may be affected by the standard contracts devised by the AFM in an attempt to relieve orchestra leaders of responsibility for social security taxes. See Earle Restaurant, Inc. v. O'Meara, 160 F. 2d 275 (App. D.C., 1947), noted in 15 Univ. Chi. L. Rev. 716 (1948). But such cases are extremely rare, and the Federation has displayed no interest either in promoting workmen's compensation laws or in taking action to bring its members within the coverage of such laws.

tion machinery or the protection for collective bargaining activity provided by the Wagner Act.

In short, the Federation's primary concern has been with only two objectives: higher wages and more employment. Generally, the first of these has been pursued at the local level,[70] and even in those instances in which the national organization has intervened, its activities have not raised any special problems nor provoked any serious complaint from employers. It is to the second objective that the Federation has always addressed its principal efforts. And, in its constant endeavor to secure more work for its members, no possible threat to their employment opportunities has been regarded as either too large or too small to be attacked. It is this single-minded devotion to the employment problem which characterizes nearly all AFM activity and which has involved the union in its most serious difficulties.

"UNFAIR" COMPETITION

Military bands.—One problem which the AFM inherited from the National League was that of competition from musicians in the military service. Since such musicians could not be subjected to union discipline, the Federation made no attempt to organize them.[71] Instead, it sought to confine them to the military duties for which they were paid, and to keep them entirely out of the civilian market.

But the enlisted musicians, whose pay then as now was not munificent, persisted in seeking paid engagements during their free time. Moreover, many operators of theaters and many sponsors of parades and fairs found that the music of military bands was frequently preferable, aesthetically and/or economically, to that of civilian musicians—particularly was this true of the United States Marine Band. Seven years of indignant protest from the AFM about this "unfair" competition resulted in orders by the War and Navy Departments forbidding enlisted musicians to accept private engagements for less than prevailing union scales. But such orders were almost impossible to enforce and in any event did not satisfy the Federation's objection that enlisted musicians who were fed, housed, and paid to provide music for the military services should not be allowed to seek private engagements in competition with the civilian musician who depended on such engagements for his livelihood.

Accordingly, the union carried the battle to new fronts. It forbade its

[70] For accounts of the activities of one large Local, see Christenson, Collective Bargaining in Chicago 230–300 (1931); Twentieth Century Fund, How Collective Bargaining Works 848–66 (1942).

[71] See note 18 supra.

members to play paid engagements with enlisted musicians or to participate in any function where military bands were performing, "except when such bands are escorting the President of the United States or any officer or foreign guest thereof, or a military or naval commander."[72] And it began a campaign to secure legislation restricting enlisted musicians to their military duties.

To make its legislative proposals more palatable, the AFM coupled them with a demand for an increase in pay for all enlisted musicians. This strategy culminated in provisions in the Army and Navy Appropriation Acts of 1908 giving enlisted musicians a pay increase, with provisos that the "bands or members thereof shall not receive remuneration for furnishing music outside the limits of military posts when the furnishing of such music places them in competition with local civilian musicians."[73]

The AFM had hardly had time to celebrate this victory when the Attorney-General ruled that the statute applicable to Navy bands did not apply to the biggest competitor of all—the Marine Band.[74] Eight more years of lobbying were necessary to bring the Marine Band within the statutory prohibition against military competition and to widen that prohibition to include gratuitous performances by military musicians.[75]

Since the enactment of these statutes, AFM musicians have suffered little from military competition. Both the Army and the Navy have made conscientious efforts to enforce the statutory provisions,[76] and the AFM stands alert to call to their attention any possible instance of violation.

Foreign musicians.—The second, and more difficult, problem inherited from the National League was that of competition from foreign bands on tour in the United States. American managers found these bands much

[72] International Musician 6–7 (August 1903).

[73] 35 Stat. 110, 153 (1908), 10 U.S.C.A. § 905 (1927).

[74] 27 Ops. Att'y Gen. 90 (1908).

[75] A provision in the National Defense Act of 1916 requires that no enlisted man "in the Army, Navy and Marine Corps . . . shall . . . leave his post to engage in any . . . performance in civil life, for emolument, hire, or otherwise, when the same shall interfere with the customary employment and regular engagement of local civilians. . . ." 39 Stat. 188 (1916), 10 U.S.C.A. § 609 (1927), 34 U.S.C.A. § 449 (1928). And the Navy Appropriation Act of the same year provides that a member of the Marine Band "shall not, as an individual, furnish music . . . when such furnishing of music places him in competition with any civilian musician. . . ." 39 Stat. 612 (1916), 34 U.S.C.A. § 702 (1928). Although these provisions seem to apply only to the individual musicians and not to military bands, they are not so construed by military authorities responsible for their enforcement. Hearings before Committee on Interstate and Foreign Commerce on S. 63 and H. R. 1648, 79th Cong. 1st Sess., at 28–29 (1945).

[76] Lapses by the Navy in allowing the Marine Band to perform for radio broadcasts were corrected after Representative LaGuardia had introduced H. R. 5647, 72d Cong. 1st Sess. (1931) to restate the prohibition against military competition in more emphatic terms and the AFM had filed a protest with Congress. 75 Cong. Rec. 11038 (1932).

cheaper to employ than the native musicians, and in the days when pomp and circumstance was still a part of the show, such bands were popular as much because of their intriguing trappings and titles as because of the quality of their performances. Consequently, at the turn of the century American audiences were being offered such imported delicacies as "Ellery's Royal Italian Band," "Creatore's Royal Italian Band," "Jovine's Royal Italian Band," "Victor's Royal Venetian Band," the "Royal Hungarian Band," the "Royal Hawaiian Band," the "Royal English Red Hussar Band," and the "Royal Imperial Band of Wilna, Russia, Special Favorite of the Czar."

Because most of these bands were brought to the United States by American promoters, the AFM sought to invoke the protection of the contract labor laws. But those laws have always contained an exception for "artists,"[77] and, though the Federation's constant contention before immigration officials that musicians were "laborers" rather than "artists" had a considerable effect upon the terminology with which the union musician came to speak and think of his position in society, it had no effect upon the interpretation of the contract labor laws.

The Federation undertook, therefore, to secure appropriate amendments to those laws, and in the interim adopted a contract labor policy of its own whereby membership was denied to, and all members were forbidden to perform with, immigrant musicians who had secured a promise of employment in this country either before entering or before applying for AFM membership after entry.[78] Despite continuing pressure from the New York Local—recipient of most of the immigrants' membership applications—the Federation refused to expand this policy into one including all immigrants.

The legislative campaign against imported competition proved more arduous than the one against military competition, however, and it was not until the last depression had made Congress particularly sensitive to problems of employment that it could be persuaded to adopt a plan designed to meet the Federation's objections without at the same time depriving American music of the benefit of all foreign stimulation. The 1932

[77] 23 Stat. 332 (1885); 34 Stat. 899 (1907); 39 Stat. 876 (1917), 8 U.S.C.A. § 136(h) (1942).

[78] AFM By-Laws Art. IX, § 10 (1947); Ibid., Art. X, § 2-E. The principal reason for the AFM's refusal in 1909 of an invitation to join musicians' unions of England, France, Germany, Holland, Belgium, Denmark, Hungary, Switzerland, Spain, and Italy in the International Confederation of Musicians was that the laws of the Confederation provided that members of all affiliated organizations should have unrestricted opportunity to accept engagements in all countries. International Musician 8 (August 1909). The Federation still entertains similar fears about international affiliation. Hearings, op. cit. supra note 68, at 342.

Act[79] provides that "no alien instrumental musician shall, as such, be considered an 'artist' . . . within the meaning of . . ." the contract labor laws "unless—(1) he is of distinguished merit and ability . . ." and "(2) his professional engagements . . . within the United States are of a character requiring superior talent." While this Act must pose some nice problems for immigration authorities, it is not likely to deprive us of any real foreign talent, and it seems to have satisfied the Federation's concern over imported musicians.[80]

With the advent of radio broadcasting, however, foreign musicians became a source of competition even though not physically imported, and in December 1945 the AFM served demands on the broadcasting industry that it cease all broadcasts of foreign musical performances. This action was taken just in time to allow Congressman Lea to add an additional paragraph to a bill which he introduced in Congress the following January, and when finally passed three months later the Lea Act[81] provided:

(a) It shall be unlawful, by the use or express or implied use of force, violence, intimidation, or duress, or by the use of express or implied threat of the use of other means, to coerce, compel, or constrain a licensee. . . .[82]

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

Apparently this provision has served its purpose—no instance of AFM interference with foreign broadcasts has been raised by the broadcasters since its enactment.

Amateurs.—The AFM, like any other labor union, represents only those of its craft who perform for hire. But, unlike most other labor unions, the nature of its craft is such that there are always a number of amateurs who are willing to perform without compensation. Proceeding on its usual premise that any musical performance represents a possible source of employment for union musicians, the Federation draws no distinction between a non-union musician who performs for pay and one who performs gratis. Both are performing where union musicians might otherwise be employed.

[79] 47 Stat. 67 (1932), 8 U.S.C.A. §§ 137b–137d (1942).

[80] H.R. 9045 and H.R. 8927, 74th Cong. 1st Sess. (1935); H.R. 12325, 74th Cong. 2d Sess. (1936); H.R. 30, 75th Cong. 1st Sess. (1937); and H.R. 1651, 76th Cong. 1st Sess. (1939), all of which would have put the admission of alien actors and musicians on a reciprocity basis, were opposed by the AFM, which considers itself better protected by the 1932 statute. See 80 Cong. Rec. 9989 (1936); International Musician 9 (June 1937).

[81] 60 Stat. 89 (1946), 47 U.S.C.A. § 506 (Supp., 1947).

[82] "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." 47 U.S.C.A. § 506(e) (Supp., 1947).

Since many of these amateur musicians are minors, the AFM has championed child labor laws broad enough to cover the theater as well as the factory and the mine, has provided in its By-Laws for the disciplining of a member whose child "after being duly notified, and requested to refrain from so doing, persists and continues to compete with members of the Local,"[83] has directed its members who are teachers of school bands not to appear in public with those bands "if such bands compete with members of the American Federation of Musicians," and has decided that in cases where school bands "make serious inroads upon the employment opportunities of members, a Local may prohibit its members from teaching such bands."[84] It has fulminated against the public appearances of Indian bands, police bands,[85] letter-carriers' bands, and bands organized by fraternal organizations. It has amended its By-Laws to make students of "colleges, music schools, universities or similar institutions . . . eligible for membership in the jurisdiction wherein the institute which they attend is located"[86] and to authorize its Executive Board to grant membership to musicians under 16 years of age where the Board "finds it advisable."[87]

Because of its strength and, in the case of school bands, because it commands the allegiance of many of the teachers,[88] the AFM has been able to stop most of the amateur performances which it has found objectionable—thereby preventing a probably infinitesimal reduction of employment opportunities for its members and, at the same time, provoking an inestimable amount of ill-will toward itself.

The climax in this ill-conceived policy toward amateurs came in 1942 when the AFM forced the NBC network to discontinue its annual sustaining broadcasts of a series of concerts by the University of Michigan's National Music Camp. Congressional hearings on bills introduced to pro-

[83] AFM By-Laws Art. IX, § 37 (1947).

[84] International Musician 14 (Supp., June 1909). The By-Laws now provide that: "The right of a member of the Federation to teach a non-union band or orchestra (amateur or otherwise) or to conduct or perform with it at any time or place, is always subject to the orders of the Executive Board of the Local." AFM By-Laws Art. X, § 7-G (1947).

[85] One enthusiastic but ill-advised member of the New York Local brought a taxpayer's suit to restrain the New York City Police Band from performing in competition with professional musicians. Goebel v. Bolan, 150 N.Y. Misc. 574, 268 N.Y. Supp. 501 (1933).

[86] AFM By-Laws Art. X, § 7-D (1947). Other applicants must apply to the Local in whose jurisdiction they reside. Ibid., Art. IX, § 3.

[87] Ibid., Art. IX, § 15.

[88] The AFM does not claim jurisdiction over music teachers as such, but many teachers seek to supplement their income by outside engagements as instrumentalists and have therefor become union members.

hibit such interference with student broadcasts[89] ran far afield to consider a number of other AFM practices in the broadcasting industry, and finally culminated in the Lea Act outlawing most of those other practices in addition to providing:

(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 . . .

(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.

Despite this statute, the National Music Camp has not been able to secure another network broadcast.[90] Although no charges have been filed against the AFM on this point, the Camp has found the networks reluctant to resume the student programs.[91]

Apart from the statute, and as a result of hearings conducted last year before a House Subcommittee,[92] the AFM has entered an agreement with the Music Educators National Conference and the American Association of School Administrators wherein the union has waived objections to student performances at school functions, on educational broadcasts, and on certain other occasions where the performances do not bring students into competition with local professional musicians.[93]

FEATHERBEDDING PRACTICES

Quota rules.—The 1903 convention of the AFM, casting about for new means of providing employment, added to the national By-Laws a provi-

[89] Hearings before Subcommittee of Committee on Interstate Commerce on S. 1957, 78th Cong. 2d Sess. (1944) (unpublished); Hearings, op. cit. supra note 75.

[90] The Camp has also been deprived of the teaching services of all AFM members. The Federation placed it on the unfair list soon after its director, Joseph E. Maddy, appeared to testify before a Senate committee. When Maddy continued to teach at the Camp, he was expelled from the union.

[91] Hearings before Committee on Education and Labor on Restrictive Practices of the American Federation of Musicians, 80th Cong. 2d Sess., at 242, 251 (1948); Letter from Joseph E. Maddy, February 2, 1948.

[92] Hearings, op. cit. supra note 68, at 246.

[93] Hearings, op. cit. supra note 91, at 363–65. This agreement was engineered by Representative Carroll D. Kearns, chairman of the Subcommittee, former music teacher, and AFM member. In a second agreement secured by Representative Kearns, the Federation waived objections to the making of recordings solely for educational use by military bands. H.R. Rep. 1162, 80th Cong. 1st Sess. (1947).

sion authorizing each Local to "place in its constitution or by-laws a clause specifying the minimum number of men who shall be allowed to play in the theater orchestras within the jurisdiction of said Local," and a number of the Locals immediately exercised this authority. But the Locals which have enforced such rules do so solely by virtue of their strength and not by means of persuasion. No union practice is more strongly opposed by the employers, and in several instances the Locals' insistence upon observance of such rules has resulted in prolonged strikes and lockouts.

Even the President of the AFM was not sure that this practice was a wise one, and in 1911 he urged the national convention to abandon it.[94] But the convention refused to follow this advice, and the best President Weber could get was an additional provision that if any Local was, in the opinion of the national Executive Board, unable to enforce its minimum-orchestra rule, the Board could step in and "adjust the matter." With that modification, and with a subsequent amendment to make it applicable not only to theaters but to "engagements of any kind," the minimum-orchestra provision remains in the national By-Laws[95] and minimum-orchestra rules are maintained by all Locals strong enough to enforce them.[96]

Moreover, the Federation itself has in recent years adopted similar quota requirements in those areas where negotiation of the details of employment is conducted on a national level. During the period 1938–40 when the employment of staff musicians at radio stations was covered by national agreements, those agreements specified a minimum amount of money which the stations were required to spend annually for the employment of musicians. And the current contracts between the Federation and the movie producers specify minimum numbers of musicians to be employed in studio orchestras.[97]

Attempts to enforce quota rules have several times involved the Locals in litigation, with varying results. One factor militating against accept-

[94] International Musician 2 (Supp., June 1911).

[95] AFM By-Laws Art IX, § 4 (1947).

[96] Thus, the Chicago Local requires a minimum of 8 men for orchestras in legitimate theaters and 18 men for musical shows, Hearings, op. cit. supra note 68, at 293–303; the New York Local requires from 8 to 10 men for orchestras in each of the ballrooms in the city, AFM Local 802, Price List Governing Single and Steady Engagements 7–8 (1947); the Los Angeles Local fixes a separate minimum for each theater and restaurant in its jurisdiction, Hearings, op. cit. supra note 68, at 25–28; and many of the Locals have minimum requirements as to the number of staff musicians to be employed in radio stations. Ibid., at 193.

[97] Each of the 8 major producers is to employ from 36 to 50 musicians, the Society of Independent Motion Micture Producers (comprising some 25 smaller companies) is to employ 104 musicians, and the Independent Motion Picture Producers' Association (comprising some 33 producers of westerns and "action" pictures) is to employ 20 musicians. New York Times, p. 1 (April 27, 1946); Hearings, op. cit. supra note 68, at 76–77, 190, 234.

ance of President Weber's 1911 recommendation was the decision of a Minnesota trial court dismissing an action brought by theater operators to enjoin the Minneapolis Local from striking to enforce its minimum-orchestra rule. That decision was affirmed by the Minnesota Supreme Court the following year, the court being unable to find anything illegal in the refusal of the musicians to work for anyone, at least where that refusal was motivated not by "malice" but by an attempt to advance their own interests.[98] A few years later, the Massachusetts court granted an injunction in a similar situation. It was willing to concede that the theater operator's "right to that free flow of labor to which every member of the community is entitled for the purpose of carrying on business" was limited by "the right of employees to combine for purposes which in the eye of the law justify interference with" the operator's right. But the Massachusetts orb could detect no justification where the purpose of the interference was to compel the operator to give the musicians "work which the plaintiff does not want done" even though that interference was also for the "indirect purpose of enabling the union musicians to earn more money."[99] When a Butte motion picture operator sought an injunction against picketing conducted to enforce quota rules it provided the Montana Court with an opportunity to anticipate the Supreme Court of the United States by twenty-three years[100] in holding picketing a form of free speech protected by the state constitution.[101] Seattle operators were more successful; the Washington court was committed to the doctrine that all picketing was illegal, regardless of its purpose, when carried on within 100 feet of the employer's place of business.[102] More recently, an attempt by a radio station operator to invoke wartime measures failed when the New York Regional War Labor Board ruled that, regardless of the merits of the quota device, it had no authority to set aside "rules which are firmly rooted in collective bargaining relations."[103]

That there are not more instances of litigation of this matter may be explained by the ultimate outcome of the dispute considered in *Lafayette Dramatic Productions, Inc. v. Ferentz.*[104] There, the plaintiff had in 1941

[98] Scott-Stafford Opera House Co. v. Minneapolis Musicians' Ass'n, 118 Minn. 410, 136 N.W. 1092 (1912).

[99] Haverhill Strand Theater, Inc. v. Gillen, 229 Mass. 413, 118 N.E. 671 (1918).

[100] Thornhill v. Alabama, 310 U.S. 88 (1940).

[101] Empire Theater Co. v. Cloke, 53 Mont. 183, 163 Pac. 107 (1917).

[102] Danz v. AFM Local 76, 133 Wash. 186, 233 Pac. 630 (1925); Sterling Chain Theaters v. Central Labor Council of Seattle, 155 Wash. 217, 283 Pac. 1081 (1930).

[103] In re Radio Station WOV, 22 War Lab. Rep. 744 (1945).

[104] 305 Mich. 193, 9 N.W. 2d 57 (1943).

opened a theater in Detroit for the presentation of dramas and comedies. Several weeks prior to the opening, the plaintiff's manager had been advised by AFM Local 5 that its rules required him to employ a six-man orchestra, but had refused to comply with the rule, informing the Local that he would not need an orchestra at all. However, when officials of Local 5 and of the stagehands' Local had confronted him two hours before curtain time on the opening night and informed him that if he did not sign a season contract for a six-man orchestra the stagehands would strike, he had signed the contract. On this showing, the Michigan court concluded that the attempt to compel plaintiff to employ musicians it did not want was not a legitimate labor objective, hence that interference with the plaintiff's operations was not justified, had issued an injunction against both unions, and had ordered cancellation of the contract with the musicians—a clear legal victory for the theater operator. But, according to the manager's subsequent testimony before a congressional committee, that decision is rather misleading. He told the committee that soon after the decision came down he received a call from the United Booking Office informing him that it would be unable to book shows for his theater unless he rehired the musicians, and that he is currently employing a six-man orchestra.[105]

It may still be true that these quota requirements in some instances "give evidence rather of the musician's longing to produce artistic music than of his policy to make work" and that they are enforced "to counteract the managers' view that the American musician, like the American mechanic, should turn out more work than his European competitors."[106] But it is even more clearly true that in most cases they are make-work devices and nothing more. Certainly there is no other explanation for a quota rule which is applied, as in the *Lafayette* case, not merely to require the employer to augment his orchestra, but to require him to hire an orchestra where he had none before.

Standby demands.—The "standby" technique—which has been more extensively used by the musicians than by any other group of organized labor outside of the construction and transportation industries—is a creature of many forms. Originally, as used by the AFM, it meant that the employer, in order to placate union objections to performances by nonunion musicians, actually hired a certain number of union members to do nothing but stand by while the performance went on. But since the union musicians performed no services, the employer was not disposed to com-

[105] Hearings, op. cit. supra note 68, at 220–21.

[106] Commons, op. cit. supra note 2, at 442.

plain if they departed before the end of the performance, or if they failed to appear at all. And when the custom had developed to this extent, it was frequently arranged to have the employer pay the agreed number of salaries directly into the Local's unemployment fund rather than to the individual musicians. Thus the "standby" has gradually been transformed from a live musician to a bookkeeping device used to calculate the amount of payment to be made by the employer to the union.

True, the process of evolution is not complete, and some of the Locals still designate specific members to do the standing by, or at least to receive the employer's payments. Moreover, the standby practiced in its most sophisticated form had to be dressed up a bit to take advantage of the Supreme Court's decision that it did not fall within the prohibitions of the Copeland Anti-Racketeering Act of 1934 as long as there was a bona fide offer of services.[107]

In any event, the Federation has scrupulously avoided any public declaration of policy on the matter. While many of its Locals have traditionally demanded standby arrangements whenever amateur musicians perform, or mechanical music is used, or traveling bands are engaged, or motion pictures are shown in theaters where an orchestra is customarily employed, there is no provision in the national Constitution or By-Laws either forbidding or authorizing such practices. Although the national officers are reported to disapprove the Locals' standby demands but to feel themselves powerless to interfere,[108] the practice is defended in the Federation's official journal[109] while the Federation's President is assuring a Congressional Committee that there will be "no more standby."[110] And the national organization has only recently abandoned its demand that standbys be employed whenever a musical performance is broadcast simultaneously over AM and FM stations.

Obviously, no clear line of demarcation can be drawn between those cases where the union demands standby payments and those where, under quota rules, it demands that the employer hire musicians he does not want. In the latter case the surplus musicians may also become standbys if the employer decides to pay their salaries but to dispense with their services. In either form, the standby technique reveals a considerable degree of ineptitude on the part of the union leadership. Whatever may be their ultimate purpose, demands couched in "standby" terminology reach the public simply as demands that musicians be paid for doing nothing—

[107] U.S. v. Local 807 of International Brotherhood of Teamsters, 315 U.S. 521 (1942).

[108] Variety, p. 53 (October 29, 1947).

[109] International Musician 6 (January 1948). [110] Hearings, op. cit. supra note 91, at 353.

extortionate claims which cannot be justified. In a different context, however, many of the union's objectives could be made more palatable. Thus, there is nothing indefensible about the position that members of a theater house orchestra hired by the season should not lose a day's pay every time the theater manager decides to run a motion picture or to bring in a traveling band. Nor is it completely unreasonable to take the position that an orchestra which supplies music for both AM and FM outlets should receive more pay than the orchestra which performs only for an AM broadcast. Even if the union contends that the manager who reduces his expenditures for music by using mechanical devices or amateur performers should make some contribution to the union's unemployment fund, that contention is not nearly as outrageous as a demand that the employer pay salaries to musicians who never unpack their instruments.

But the union has persisted in its standby demands, and congressmen have been outraged. As a consequence, the Lea Act provides:

> (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 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. . . .

These statutory provisions are broad enough to cover not only a flat standby demand but also many of the AFM's quota requirements, and the union selected one of the latter to test the constitutionality of the statute, in a dispute avowedly created for that purpose. Chicago radio station WAAF, which devotes 90% of its musical time to recorded and transcribed music, employed three members of AFM Local 10, the individual employment contracts specifying that one was a "platter-turner,"[111] an-

[111] A "platter-turner" is not a disc jockey. In distinct contrast to the disc jockey, he is a silent performer. He operates the transcription-playing equipment and in the larger studios he also operates the record-playing equipment on the disc jockey's program. Disc jockeys, whether they turn their own records or not, are classified as announcers and come within the jurisdiction of the American Federation of Radio Artists (AFL).

other a platter-turner and pianist, and the third a record librarian, although all three actually performed services only as record librarians. As President of Local 10, Petrillo served written demand on WAAF that it employ three staff musicians and that the platter-turners be confined exclusively to such work. When the station failed to comply with this demand, the three members already employed were called out on strike and a picket was placed in front of the station.

An information outlining the above facts, alleging that Petrillo had acted "knowing that [WAAF] had no need for the services of additional employees," and charging him with a violation of subsection (a)(1) of the Lea Act was filed in the Federal District Court in Chicago.[112] But when the defendant moved to dismiss the information, District Judge LaBuy granted the motion on the ground that the statute was unconstitutional in four respects: 1) The phrase "in excess of the number of employees needed" was too vague to satisfy due process requirements for criminal statutes; 2) in limiting the Act to employees of radio stations, Congress had set up an arbitrary classification which violated due process; 3) insofar as the Act limited the right to strike it violated the Fifth and Thirteenth Amendments; and 4) in so far as the Act imposed limitations on peaceful picketing it violated the First Amendment.

The Supreme Court, considering the case on direct appeal,[113] found points 3) and 4) of the District Court's decision not properly before it[114] and point 2) of little substance.[115] As for point 1), a majority of the Court[116] did not share Judge LaBuy's view that the Act imposed upon the defendant an unconstitutional burden of knowledge which only the employer could possess: "The language . . . conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice." Accordingly, the case was remanded for trial, leaving for later decision questions as to whether the Act could constitutionally be applied to limit the right to strike or to picket.

One of these questions dropped from the case when the government filed

[112] Criminal penalties are prescribed in subsection (d) of the Lea Act for "Whoever willfully violates any provision of subsection (a) or (b) of this section. . . ." 47 U.S.C.A. § 506(d) (Supp., 1947).

[113] U.S. v. Petrillo, 332 U.S. 1 (1947).

[114] Both because the motion to dismiss was based solely on the ground that the statute was unconstitutional on its face and because review of cases appealed under the Criminal Appeals Act is limited to questions presented on the face of the statute.

[115] "[I]t is not within our province to say that, because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power." United States v. Petrillo, 332 U.S. 1, 8 (1947).

[116] Justices Reed, Murphy, and Rutledge dissented on this point. Justice Douglas did not participate in the decision.

an amended information omitting any reference to picketing. And after trial on the amended information, wherein defendant waived jury, the second question also disappeared when Judge LaBuy delivered a judgment of acquittal on the ground that the government had failed to prove an essential element of its case. Although the Judge found that station WAAF did not need the three additional musicians whose employment the defendant demanded, he also found that there was "no evidence whatever in the record to show that defendant had knowledge of or was informed of the lack of need for additional employees prior to the trial of this case."[117]

This decision has been widely described by the press as marking the "death of the Lea Act," but it hardly has that much significance. True, it is not clear just what the government could do to strengthen its proof of defendant's knowledge except to have the station operator expressly inform him that the station does not need more employees, and that would merely make explicit what was implicit in the refusal to hire in the WAAF case, but a jury or a different judge might well reach a contrary conclusion on the evidence presented in that case. The maximum significance of Judge LaBuy's decision, then, is that the provision of the Lea Act involved is dead where Judge LaBuy sits, at least until the Seventh Circuit Court of Appeals or the Supreme Court gets an opportunity to rule on a similar question in another case, and that it may discourage the bringing of similar cases under the Lea Act.

More likely to discourage resort to the Lea Act in such cases, however, is the fact that Congress has now made available another procedure, not confined to the broadcasting industry, wherein the government does not carry as great a burden of proof as in a criminal case.[118] Section 8(b)(6) of the Taft-Hartley Act[119] makes it an unfair labor practice, subject to cease and desist order of the National Labor Relations Board, for 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.

Obviously, the interpretation of this statute will not be free from difficulty either. In applying it to a situation like that presented in the WAAF case, will it be necessary to prove that the union knew that serv-

[117] United States v. Petrillo, 75 F. Supp. 176, 181 (Ill., 1948).

[118] The Congress which passed the Lea Act also created another possible avenue of criminal prosecution by amending the Anti-Racketeering Act to eliminate the exceptions for bona fide wage claims and for labor union activities upon which the decision in United States v. Local 807 of International Brotherhood of Teamsters, 315 U.S. 521 (1942), discussed in text at note 107 supra, was based. 60 Stat. 420 (1946), 18 U.S.C.A. § 420(a) et seq. (Supp., 1947).

[119] 61 Stat. 140 (1947), 29 U.S.C.A. § 158(b)(6) (Supp., 1947).

ices were "not to be performed" by additional employees whose hiring it demanded? If the employer seeks to circumvent that problem by agreeing to accept the employees, but then gives them no work to do and refuses to pay them, can the union take action to compel him to pay the employers for services which "are not performed" and rely upon the employment agreements as a defense to an unfair labor practice charge? There is little profit in speculating about the answers to such questions, but the very fact that they arise indicates that those radio station and theater operators who have already discharged surplus musicians in reliance upon the Taft-Hartley Act may be overly optimistic.[120]†

[120] Charges recently filed against AFM Local 400, based on its demand for standbys when traveling orchestras appear in the theaters of Hartford, Connecticut, may provide the first test for this section if the federal commerce power reaches such a situation. Variety, p. 46 (April 28, 1948).

† The second part of this article will appear in the Winter issue.