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Symphonic metamorphoses

Variations on vulnerability: orchestral musicians' employment in times of crisis

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Publication date

2022

[Link to publication](#)

Citation for published version (APA):

Kurzbauer, H. R. (2022). *Symphonic metamorphoses: Variations on vulnerability: orchestral musicians' employment in times of crisis*. [Thesis, fully internal, Universiteit van Amsterdam].

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5. What's in a name: an orchestra, a symphony, a symphony orchestra, a philharmonic, or all of the above?

An examination of the oft-confusing nomenclature associated with musical organizations creates its own level of questions. Currently, the terms 'symphony,' 'orchestra,' and 'philharmonic' are used interchangeably. Combing through the conventional English language dictionaries, the reader learns that the term 'symphony' derives from ancient Greek roots, 'sýn' meaning together and 'phoné' meaning sound. To the ancient Greeks, the term 'orchestra' indicated a circular space in front of the stage in which the chorus would act out words through dance or 'orchesis.' The humanist revival of Greek and Roman cultural ethos shows new meanings for the term. By the early 17th century, the 'orchestra' designated the area in a theater where instrumentalists performed.¹⁷⁴ European medieval texts point to various functions of the term 'symphonia' in relation to specific instruments (dulcimer, hurdy gurdy) as well as a generic term referring to a pleasing harmonious sound made by a group of instruments. By the early 17th century, symfonia (various spellings, sinfonia or symphonie) was used to denote the compositions written for musical ensembles, a usage reflected by the definition of a symphony as a composition written for an orchestral ensemble. As orchestras were established throughout Europe, the meaning of the term changed to reflect not only the placement of instrumentalists but their collective. Jean-Jacques Rousseau's entry for Diderot's *Encyclopédie* shows a sensitivity to the dual nature of the term, orchestra:

*"(Orchestra) means sometimes the place where those sit who play on the instruments, as the orchestra of the opera-house; and Sometimes the place where the whole band in general are fixed, As the orchestra of the spiritual concert at the Château des Tuilleries; and again, the collection of all the symphonists"*¹⁷⁵

To add a bit of confusion to this brief etymological enquiry, English-speaking territories might call their 'orchestras' symphonies or double up on terms by referring to these performing groups as 'symphony orchestras. To provide U.S. examples, the top-ten orchestral ensembles include: the Chicago Symphony Orchestra, the Cleveland Orchestra, and the New York Philharmonic all refer to large orchestras with over 100 musicians employed. The term 'philharmonia' from which Philharmonic is derived stems from the ancient Greek, 'love of harmony' and is primarily used to refer to an orchestra or the society that sponsors the orchestra. The foray into the complexities of the nomenclature associated with the orchestra is only a prelude to the chaos in

¹⁷⁴ See, Martin Staehelin. "Orchester" in *Handwörterbuch der musikalischen Terminologie* ed. H.H. Eggebrecht 1972 for a complete lexicology of musical terms and origins.

¹⁷⁵ Jean-Jacques Rousseau. *A Complete Dictionary of Music* (translated by William Waring) 1779 p. 301.

terminology when reference is made to an orchestra's manager, sometimes titled as director, manager, CEO, president or in the case of several major U.S. orchestras, a combination of two of the above (as in, CEO and President New York Philharmonic Orchestra).¹⁷⁶

5.1. Musicians, maestros, managers, and other key players

A plethora of historians and musicologists have opined on the origins of the modern-day orchestra and put forth different theories as to the when and where of its inception. Several schools of thought bring the orchestra back in time to ancient history while others focus on the development of the orchestra as a collective post 16th century. Monteverdi's score for the operatic drama *Orfeo*, first performed in 1607, called for no less than forty instruments including viols, harps, lutes, recorders, and percussion instruments to represent different moods and scenes in the drama. Monteverdi's insistence in dividing his instrumental forces into sections predates modern orchestral divisions: string, wind, brass, and percussion sections, by several centuries. Musicologists tend to agree that the 'modern' orchestra with its complement of approximately 100 musicians is a product of the 19th century.

To the naked eye and/or ear, the differences between modern U.S. orchestras and their Dutch counterparts are minimal. The 21st century orchestra consists of between 95-110 musicians divided into strings, winds, brass, and percussion sections. Regardless of their geographical location, orchestral musicians fulfill similar roles. Their core business consists of rehearsals, performances, recording sessions and tours. Conductors holding titles such as maestro, music director and/or chief conductor, reign over musical matters while managers and artistic administrators run the daily affairs of the orchestra-as-institution throughout the world. Yet, whereas U.S. orchestras are beholden to corporate and individual philanthropy for funding, the fortunes of their European counterparts depend on state and regional subsidies. Before entering a discussion on 'the way they pay' and the labyrinth of issues in the staffing and functioning of the orchestral entity on both sides of the Atlantic - issues that run the gamut from orchestral finances, employment conditions, legislative protection for musicians and the new force of musicians' platforms joining with established unions to promulgate change - I will discuss the inner workings of 'the way we play.'

¹⁷⁶ For example, Deborah Borda serves as President and CEO at the New York Philharmonic Orchestra, see: <https://nyphil.org/about-us/artists/deborah-borda>

One of the key questions that reoccurs within *movements* that involve individual musician legal actions in the orchestral workplace relates to the ensemble's audition and tenure procedures. The subject of auditions will be revisited in great detail in the *Intermezzo: of competitions, horse races and orchestral auditions*.

5.2 Basic differences between orchestras: of salaries and services

To fully understand the complexities of employment in orchestras, it is important to understand that regardless of geographical location, there are great differences between full-time orchestras that offer salaries to their musicians and per-service orchestras that pay musicians for the benchmark unit of their work: the service. The term service refers to rehearsals, concert performances and recording sessions. To answer the FAQ, 'how long is a service?' the simple answer is somewhere between two and three hours often dependent on the collectively bargained contract between the orchestra and its musicians. Both U.S. and Dutch orchestral contracts stipulate the maximum number of services per work week. One of the closing *movements* in this study makes mention of a dispute between Dutch-based freelancers and a leading orchestra with regard to what constitutes a service and different views as to how freelancers should be paid for services.

5.2.1 Salary-based orchestras

This enquiry is primarily concerned with salary-based orchestras (the top-tier of U.S. orchestras, and the main state-subsidized orchestras in the Netherlands), nonetheless, the varieties of highly precarious hybrid and per-service orchestras deserves mention: these so-called 'pick up' groups operate under a variety of flexible agreements and methods of payment. In the U.S., orchestras in the more protected salary-based category offer a minimum weekly wage to contracted musicians under a CBA regardless of whether or not the musicians perform in that given week. Freelancers who are given short-term contracts are compensated on a per-service basis. In the Netherlands, salary-based orchestras calculate yearly and monthly 'work hours' based on the length of services-per-week and freelancers fall under a separate collectively bargained agreement (CAO) to be discussed in detail further on in this study.

5.2.2 Per-service orchestras

Per-service orchestras proffer fixed-rate employment to musicians based on the number of services an individual musician plays and do not offer either the salary-

guarantees or benefits accorded to musicians who work under CBAs. If a per-service orchestra programs music that necessitates the use of two harp players, these two musicians will be paid for the number of services they play but certainly not for ‘harp-less’ weeks. Not to harp on the subject, this differentiation between the salary and the per-service orchestras is of considerable import when adding freelancers into the equation: all musicians in a per-service orchestra could be considered as freelancers as these orchestras hold no obligation to rehire musicians. The exception to the per-service category are hybrid orchestras that hire a small core of musicians on salary and the remainder of the musicians on a per-service, on-call basis. Freelance musicians often perform in all types of orchestras. Even if legislation stipulates: the employer and the employee must behave in a manner that befits a reasonable and fair employer and a reasonable and fair employee (see, Art. 7:611 Dutch Civil Code (DCC)) there is little security for freelance substitutes musicians in a saturated market.

“As a freelancer in heart and soul, I perform in all types of orchestras - from established top orchestras to per-service orchestras, sometimes regardless of conditions and payment. We have no guarantees, not much equality in terms of employment. Musicians live to play: the more services in your diary, the better. In an ideal world we would hope for stability and of course equal pay.”¹⁷⁷

5.3 How is the size of an orchestra determined? What is the complement?

Post 2007-2008 financial crisis, the complement, the term that refers to the size of the orchestra with a focus on the number of players employed to perform in each section, has been bitterly contested as real-life cases in the Netherlands and the United States will demonstrate. The size of the complement featured prominently in the Atlanta Symphony Orchestra’s (ASO) shortlist of problematic issues that figured significantly in labor disputes culminating in two lockouts, in 2012 and 2015. In the Netherlands, the size of the complement was a key restructuring factor in the orchestral reorganization at the Dutch Broadcasting Music Center (Muziekcentrum van de Omroep, MCO) in 2012-2013. The parties responsible to make the cuts that effectuate reorganizations in both jurisdictions wax eloquent on decisions as to “how to cut the number of players efficiently without destroying the orchestra”¹⁷⁸ and have put forth theories to back up the assumption that “you can keep an orchestra alive with

¹⁷⁷ Conversations with Dutch freelance violinist, Gideon Nelissen, active freelance substitute player in the Netherlands, Belgium and beyond.

¹⁷⁸ Interview, Ella Broekstra HRM Stichting Omroep Muziek (SOM) Dutch Broadcasting Foundation.

a core of committed players.”¹⁷⁹ Musician responses to the hatchet men and women who make such decisions provide evidence of unanimous antipathy “whittling down an orchestra whatever the method¹⁸⁰ is an anti-musical and inhumane operation not only on the personal-personnel front but in terms of what actually happens musically to the ensemble, no matter how it is undertaken.”¹⁸¹ Commentary from the U.S. points to the fact that reliance on a ‘small core’ is merely an excuse for the musical ensemble in question to depend on cheaper, freelance labor to fulfill orchestral obligations.

5.3.1 The complement throughout history

The following section aims to chart ‘the complement’ through a consideration of historical, artistic, and pecuniary factors in order to detail the issues that play into this ‘hot’ bargaining and reorganization-related topic. Musical, technical, and economic considerations determine the number of musicians employed and here lies the problem: if the board or in the Dutch variants, management dictated by subsidy constraints opt to cut corners and balance the budget, the first cuts usually fall in terms of the number of musicians employed. (The Atlanta Symphony, Detroit Symphony, the Dutch radio orchestras, and Holland Symfonia’s transition to Het Ballet Orkest in 2013 provide recent post-crisis examples of dramatic cutbacks in terms of complement.) To fully understand the complexity of this issue, it is important to review the changes over time concerning the size of the orchestra.

Throughout history, the question ‘how large is an orchestra?’ has met with ambiguity: ‘the answer rests on many factors.’ Dependent variables such as where the orchestra performs, who pays for the orchestra and the demands of the composer’s score are factors. In addition, music directors also add their ‘say’ into the discussion: there are maestros who attempt to recreate a certain sound that might call for more players than those who pare down a string section in search of another type of ‘sound.’ The composer’s intention as marked in the score is considered to be the historically sacrosanct point of departure. If a score calls for three flutes and one piccolo it would be obviously undesirable to perform the piece with fewer musicians. Yet, the situation is not often clear as some composers did not make precise notations whereas others deliberately left interpretation to the imagination. And the situation becomes more

¹⁷⁹ Conversations with Piet van Gennip, formerly a senior staffer at Berenschot. Director, Het Ballet Orkest (Dutch Ballet Orchestra) since 2013.

¹⁸⁰ In the Netherlands, the term ‘kaasschaaf’ (cheese slicer) was used to denote a restructuring in which the cuts were equally shared by all sections/departments, the Dutch terms *pondspondsgewijze* (a questionable translation, a pound of flesh) has been used to characterize this method of cutback.

¹⁸¹ Conversations with Frans Brügger, maestro and musician extraordinaire.

complicated when we focus on the string section as few composers have specified the exact number of strings intended to perform their compositions.

Orchestral musician's lore is full of anecdotes in which a famous musician-composer hears a performance of his/her piece performed completely differently to the holy grail, the score only to observe that the 'deviant tempo' was 'so much better.' Igor Stravinsky, a composer renowned for his meticulous approach to score-writing was notorious for conducting his compositions in totally different ways at each and every performance.¹⁸² Thus, there is a degree of serendipity with regard to a focused adherence to the composer's score-based requirements. How does this translate to the complement? As the brief historical recapitulation below uncovers, this too, is a matter of interpretation. A 'historically informed' performance of a Mozart symphony¹⁸³ calls for far less string players than a performance of the same symphony in a large concert hall given in 'modern' style. The famed Mannheim Orchestra, pearl amongst 18th century orchestras glowingly described by the well-travelled English chronicler Charles Burney as "nearly hundred hands and voices, many of them excellent,"¹⁸⁴ was a source of prestige to their patron¹⁸⁵ who extolled the musical ensemble with military metaphor: "an army of generals, equally fit to plan a battle as to fight it."¹⁸⁶ Under the leadership of luminaries such as Leopold and Wolfgang Amadeus Mozart and the Czech violin virtuoso Johann Stamitz, the ensemble became a musical torchbearer for orchestral quality. Its permanent staff numbered 23 violins (12 first violins/11 second violins), a trio of violas, four cellos, three double basses, four flutes, three oboes, four clarinets, four bassoons, six horns, and kettledrums. By the turn of the 19th century, the string section was enhanced by an additional three violas and no less than seven basses.

The growth in terms of the complement from the salon-size orchestras of the 18th centuries to the large symphony orchestras of the late 19th and 20th centuries is

¹⁸² See, Erica Buxbaum commenting on Stravinsky's interpretations. "We cannot unquestionably accept either his metronome markings or his own recorded performance tempi as reliable guidelines." *Performance Practice Review*, vol. 1 no. 1 1998.

¹⁸³ The historically informed, or authentic performance movement hearkens back to the 1950s when Gustav Leonhardt formed his Baroque Ensemble. The performance practice revolution focused on a close reading of performance conventions at the time the music was written as well as the use of 'period' instruments. Leading practitioners included fellow Dutchmen Frans Brüggen and Ton Koopman. Scholars exemplified by Richard Taruskin have mounted considerable criticism of the movement pointing out that so much information concerning period performance is speculative, open to discussion and based on spurious sources. See, Richard Taruskin. "In Theory" in *Text and Act: Essays on Music and Performance* 1995.

¹⁸⁴ See, Charles Burney. *The Present State of Music in Germany, the Netherlands, and United Provinces: or, The Journal of a Tour through Those Countries, Undertaken to Collect Materials for a General History of Music* 2003 p.38.

¹⁸⁵ Karl Theodor von Sulzbach, the famed orchestra's patron held the position of Elector of Palatine between 1743-1778.

¹⁸⁶ *Ibid.*,

inextricably linked to the rise of the new 'bourgeoisie:' the middle class eager to make its mark in a social context. The call for concert halls as a center for cultural activity in the mid-1800s was heard on both sides of the Atlantic as opera performances and orchestra concerts became 'the place to be seen and heard.'¹⁸⁷ The creation of new performance venues in the form of sizeable concert halls went hand-in-hand with market-related demands that prompted composers to create masterworks to please both the performers and their audiences in increasingly larger spaces. To quote Leo Beranek, a MIT-based engineer who spent the greater portion of his 102 years researching acoustics: "performance spaces that dominated Europe, and North America, since the Renaissance have shaped, or were sometimes shaped by, the styles of music that prevailed."¹⁸⁸

The 19th century development towards an expanded complement of orchestral musicians continued through the early 20th century. Richard Strauss, a master of orchestral tone poems featuring instruments as 'characters' operating within a complex musical text composed his music with large forces in mind. In terms of strings, the richly orchestrated score to his opera *Salome* calls for at least 16 first and 16 second violins, 12 violas, 10 cellos and eight basses. Gustav Mahler, Strauss's contemporary asked for even more musicians in his Symphony No. 8, the *Symphony of a Thousand*. The composition received the appellation because of the vast number of musicians (including singers) specified in the score. Mahler conducted the premiere performance in 1910 with a staggering number of performers: 858 singers and 171 instrumentalists onstage. As an interesting footnote, musicologists are of the opinion that the 'supersized' dimensions of Mahler's colossal composition were based on the composer's exposure to U.S. halls and orchestras.¹⁸⁹ To the European ear and mindset, the large forces called upon to move the symphony into its proper experiential space were doubtlessly 'American' in scope. In his own words: '*Endlich ein fortissimo!*' ('*Fortissimo*, finally').¹⁹⁰

5.3.2 Is there a correlation between complement and output?

"Your orchestra is only as good as its weakest link" is a commonly held perception amongst professional musicians, which points to the question as to how output is

¹⁸⁷ See generally, Spitzer and Zaslav, *supra* at fn. 18 as well as Philip Hart, *supra* at fn. 28.

¹⁸⁸ See, Leo Beranek. *Music. Acoustics & Architecture* 1962 p.8.

¹⁸⁹ Gustav Mahler conducted the Metropolitan Opera and served as Music Director of the New York Philharmonic from 1908 until his untimely demise in 1911.

¹⁹⁰ Reputedly uttered upon experiencing the great falls at Niagara. Alan Ross details the story in full in his wonderful blog, *The Rest is Noise* at: http://www.therestisnoise.com/2006/01/the_niagara_for.html

measured. Economist James Gapinski opined that since audiences do not perceive the difference between the contribution of a single second violin to the total output of an orchestra, the possibility of staging a concert without that second violinist is possible and economically advantageous.¹⁹¹ To complete his analysis, Professor Gapinski studied a section frequently maligned within the orchestra for its subservience to the first violin section and role of ‘lesser importance,’ a viewpoint that carries little weight taking the orchestral musicians’ ‘bible,’ the musical score into consideration. While first violins often carry the melody and second violins play a supporting ‘inner voice’ role, their presence in the orchestra is as necessary as that of other players.

Professor Gapinski’s focus on output elasticity leads us down a slippery slope with regard to the size of the orchestral complement. One of the central points of contention in collective bargaining processes is the size of the ‘complement.’ The 2014 lockout at the Atlanta Symphony Orchestra (ASO) spurred headlines such as: “[o]rchestra’s size is the big issue.”¹⁹² Musicians supported by conductors consider the ‘complement’ as sacrosanct, within the ambit of artistic decision-making. Not only the music performed dictated by directions in composers’ scores¹⁹³ but also the size of the performance venues and performance traditions mandate the appropriate extent of the complement. As discussed earlier in this inquiry, managers/boards especially in the years following the financial crisis of 2007-2008 made the decision to cut the size of orchestral complements in an attempt to save money.

5.3.3 The rock bottom: the artistically acceptable complement

For all the variance that comes to the fore in the examples cited above, there is nonetheless a minimum number of musicians needed to perform the ‘standard’ orchestral repertoire of the 19th-21st centuries. The average full-scale symphony orchestra in the 21st century consists of approximately one hundred musicians.¹⁹⁴ The string sections are made up of between 14-18 first violins, 12-16 second violins, 10-12 violas, 10-12 cellos and seven-nine basses. Discrepancies in the number of players-per-section are based on several variables that deserve further consideration: the size of the ‘home’ concert hall, the music director’s prerogative, and orchestral finances. The internationally recognized opera and orchestral conductor Donald Runnicles

¹⁹¹ James Gapinski. “The Production of Culture” 1980 pp. 578-586.

¹⁹² See, <https://www.myajc.com/blog/arts-culture/orchestra-size-resonates-big-issue-atlanta-symphony-dispute/3HfL5VSC2dBpXObUQFscpJ/>

¹⁹³ Composers usually specify the size of the complement in terms of winds, brass, and percussion players while general performance practice dictates the size of the string complement.

¹⁹⁴ Based on data taken from 50 European and U.S. orchestral websites.

whose articulate support for the ASO during its recent crises inspires commentary later in the *movement*, supports a substantial number of string players to achieve the 'sound' he envisions in late 19th century-20th century repertoire.

*"An orchestra not only tunes from the bass up, but the motor is so often in the lower register. In our festival concert hall, in particular, the difference between eight and seven double basses is colossal. I love double bass sounds and think the orchestra deserves this really rich bass resonance. So, I will always go for bigger double bass sections. One of the most exciting sounds in the world is eight basses and ten celli, as we have here at Grand Teton, playing triple piano – it's less a sound and more of a vibration that can draw an audience in."*¹⁹⁵

And, although orchestras close to the Mannheim size populated Mozart's orchestral cosmos, the musical king of the multitask, the composer who could conceive harmonies while playing billiards was delighted by a surprisingly large orchestra in Vienna. "The symphony (first rehearsals and premiere of Mozart's Symphony No. 34 K.336) went *magnifique*. Forty violins played, the winds were doubled, and there were ten violas, ten basses, eight cellos and six bassoons!"¹⁹⁶ Perhaps we can postulate that the abundant number of musicians (a true record in terms of bassoons!) reflects more the availability of musicians than a true representation of the forces essential for performance. While Mozart seemed delighted with 'more over less,' his symphonies are traditionally performed with significantly less musicians, a complement of 7-5-4-3-2 as the 'norm' in string sections. Discussions with Frans Brügger, whose expertise concerning 18th-19th century performance practice is universally applauded, observed: "Mozart calls for spontaneity and a sense of humor, his music embodies a sense of structure wrapped in glee. If you let his genius unfold with a small number of players regardless of the size of the hall, you create an aural revolution."¹⁹⁷

5.3.4 Why has the complement been such a focal point at times of crisis?

Where does Mozart's enthusiasm for enlarged orchestral forces and the great interpreter Frans Brügger's reflective pragmatism leave us in our discussion of the complement and the role that this discussion plays in terms of its orchestral employment implications? Reflecting on the cutbacks and compromises that traumatize orchestral negotiations in the present tense is it possible to posit that player reduction is another means to an end in restructuring the orchestra to fit into a pared down economic structure? In July

¹⁹⁵ Sir Donald Runnicles as quoted with reference to his summer music festival orchestra, The Grand Teton Music Festival 2017. Full article available at: <https://www.thestrads.com/i-always-go-for-bigger-double-bass-sections-conductor-donald-runnicles/7007.article>

¹⁹⁶ Wolfgang Amadeus Mozart, et al. *The Letters of Mozart and His Family* reprinted 1997 p. 724.

¹⁹⁷ Conversations with Frans Brügger translated from the original Dutch.

2012, the complement demise hit the world-famous Philadelphia Orchestra. Emerging from Chapter 11 bankruptcy, the musicians referred to by classical music fans as the famous Philadelphians accepted a 15% pay cut, a hiring freeze for the open positions, and a reduction of the complement by 10 players. This reduction became a common discordant theme in orchestras across the United States and Europe, as case studies at the close of the *movement* will illustrate.

5.3.5 Has the complement issue impacted orchestras under fire in the Netherlands?

An ongoing topic of hot debate for orchestras faced by subsidy cuts in the Netherlands relates to the complement, “the unions and of course the musicians are committed to preserving the size of the orchestra while management faced with deficits pushes for ‘less is more’ in terms of numbers of employed musicians. The trend is not only a U.S. phenomenon, but I fear, here to stay in the lowlands since cuts rather than spending is the way of cultural life.”¹⁹⁸ The orchestral constellation in the Netherlands has shrunk from 21 orchestras pre-crisis to 10 subsidized orchestras in 2018 with a merger looming for the Arnhem Philharmonic (Gelders Orkest) and het Orkest van het Oosten in the 2019-2020 season. The complement issue was bitterly contested during the most recent reorganization of the orchestras within the aegis of the Dutch Broadcasting Music Foundation.

“On the one hand, musicians were fighting for their very existence as performing artists, hoping to stay in the excellent ensembles they had devoted their lives to. When management brought forth plans in which certain instruments were cut completely from the complement and intended to reduce the string complement, this was met with anger and eventually despair. On the other hand, we were forced to face a reality of disappearing subsidies that meant the survival of the whole might well come down to cutting where necessary.”¹⁹⁹

5.4 What are the sections within the orchestra?

Similar to their historic predecessors, the orchestra in the 21st century is divided into instrumental groups. The strings, the orchestra’s largest group, consists of between 50-60 players and is subdivided into five sections: first violins, second violins, violas, cellos, and double basses. The woodwind and brass sections are divided into smaller instrument-related subsections. Add to the mix timpani, the percussion section,

¹⁹⁸ Comments by Hein Glaubitz, former Manager Netherlands Radio Philharmonic (RFO) and Radio Chamber Philharmonic Orchestra (RKF) 2004-2006.

¹⁹⁹ Conversations with Cyril Scheepmaker, bass trombonist Netherlands Radio Symphony Orchestra (NRSO) subsequently RKF, member MCO Works Council appointed in 2005.

keyboard instruments such as piano, celesta and harpsichord, two harps and the orchestra is complete.

It is vital to understand that the professionals in the orchestra are specialists with a specific focus and course contractual obligation to play a specific instrument. While some instrumental groups call upon members to 'double' on related instruments, exemplified by trumpet players who play cornet and trombonists who double as euphonium players when needed, it is almost unheard of for an orchestral player to play two unrelated instruments professionally within the orchestral organization. A rare exception, Cleveland Orchestra violinist Carolyn Gadiel Warner has been a full-fledged member of both the keyboard section and the violin section since 1979: "[F]or me it is certainly a rare privilege, a real honor to perform in such a wonderful ensemble taking part in the orchestra from two rich, different musical perspectives."²⁰⁰ For the most part, the technical challenges inherent to a specific one instrumental are completely different in another group. "We don't get involved or even understand why they (string players) need to engage in an ongoing 'back and forth' over bowings, but then again, string players do not know the first thing about making reeds" to quote the late, great Bill Bennett.²⁰¹

5.4.1 Is there a strict hierarchy in an orchestra?

The most obvious answer to the question is YES: orchestral players are subordinate to the musical demands of the conductor who in turn carries the responsibility to transmit an interpretation of the composer's artistic vision as expressed by the notes in a written score. Federico Fellini's deliciously satirical film *Prova d'orchestra*²⁰² depicts the autocratic orchestra and continues on a hilarious path to develop a plausible cause for the overthrow of the 'fearless leader.' The very nomenclature used for the conductor "maestro" or master vs. the musicians 'orchestral players' and the fact that traditionally conductors wave a baton, a mini scepter highlights the dominance of the conductor within the hierarchy. This subject will be further analyzed in subsequent *movements* with viewpoints to consider from those who direct to those who 'perform under the direction.'

Turning to a description of orchestral sections, another important point is that there is a hierarchy within each instrumental section: each section has a leader, referred to as

²⁰⁰ Cleveland Orchestra violinist and keyboardist, Carolyn Gadiel Warner in conversation 2014-2017.

²⁰¹ The inimical Bill Bennett, principal oboist San Francisco Symphony collapsed onstage and died shortly thereafter in 2013.

²⁰² In English, *The Orchestra Rehearsal* released to great critical acclaim in December 1979.

the principal player. Most sections also appoint sub-principals, or associate/assistant principals. Wind and brass sections have their own principals however there is some difference of opinion as to whether the flute or the oboe is the leader of the wind section, a key issue to flesh out issues crucial to the *Rowe* case under discussion in a subsequent *movement* dealing with discrimination in the orchestral workplace.

The ‘super’ leader is the concertmaster, or in British parlance, the leader. Following late 16th century musical conventions, the concertmaster starts the tuning process that initiates rehearsals as well as concerts by bidding the principal oboe to play one single note, the ‘tuning A.’²⁰³ The concertmaster determines the bowings as tradition would have it in consultation with the conductor, however many present-day maestros ‘stop over’ at orchestras, spending less than a week with the ensemble they conduct and frequently do not communicate their wishes in advance. “Either they trust us to take these decisions, or they simply do not have time to do what the late great conductors did, sit down and mark scores.”²⁰⁴ To clarify, the concertmaster is not only the ‘head’ of the string sections but serves as the leader of the entire orchestra, as Daniel Majeske, former Concertmaster at The Cleveland Orchestra was wont to say, ‘the ‘second in command’ to the conductor.’ Indeed, stories that are the stuff of living legends abound in which the concertmaster takes the baton from a famed conductor eventually inspiring a career as maestro. Presently, the New York Philharmonic’s Music Director, Jaap van Zweden first introduction to conducting occurred when he served as concertmaster at the RCO and followed Leonard Bernstein’s orders.²⁰⁵

5.4.2 How does the hierarchy work within the orchestra?

“An orchestra is not a pottery course but a performance-oriented society.”²⁰⁶ Here we must differentiate between what takes place ‘on’ the rehearsal floor as opposed to the general work floor. Specifically, the hierarchy within the rehearsal process centers on

²⁰³ Orchestras worldwide tune to A with a pitch variance whose explanation goes beyond the scope of these FAQs. Tradition has it that when oboes were added to the string complement in late 16th century France, their piercing pitch could be heard above the gut-string viols and violins thus the important task of tuning was granted to the oboe.

²⁰⁴ The all-important ‘up or down bow,’ the direction the bow moves is a determining factor in musical line and communicating the orchestra’s approach to the score. After the concertmaster marks his/her part, the orchestra’s librarian marks the section parts. The concertmaster usually confers with the other section leaders and of course the conductor before these markings are disseminated to the sections.

²⁰⁵ Jaap van Zweden’s first encounter with conducting on Leonard Bernstein’s request is recounted in the *New York Times*, available at: <https://www.nytimes.com/2016/01/28/arts/music/new-york-philharmonic-taps-jaap-van-zweden-as-its-next-maestro.html>

²⁰⁶ See, Munich-based conductor and producer Christian Gansch at: <https://www.bsi-software.com/en/magazine/article/what-companies-can-learn-from-orchestras-1.html>

the conductor as the final arbiter of musical ideas and the specifics within the musical score. Further, depending on the instrument, the individual musician takes the score markings and suggestions given by the section leaders. Thus, while discipline and acceptance of hierarchical positions is mandatory to performance, the hierarchy is subsumed, some insiders would note 'subdued' by its adherence to musical decision-making. For example, the concertmaster is responsible to set the bowings for the first violin section and consults with other string leaders to ensure that the entire string section is 'on one musical page.' Cross-Atlantic tradition holds that section players are not to express their opinions 'publicly' on these matters.²⁰⁷ This means that during rehearsals, the section should focus on the directions given by the section leader and of course, the conductor without commentary. The conductor plays a definite role at this level of coordination expressing his/her musical opinions about the technical aspects of execution to serve musical goals: the directions given by the composer in the score are reinterpreted by the orchestra.

5.4.3 Of subsections and hierarchy: how is seating determined in orchestral string sections?

The seating in professional orchestra string sections can pose a challenge to logicians. Whereas the concertmaster/leader is ubiquitously the first among firsts, the lead violinist (and the orchestra's most important principal), the musicians who sit next to and in back of the leader, are members of the first violin section. Although the first violinists play the same notes,²⁰⁸ their salary is differentiated according to a ranking system in which the concertmaster is the player with the most responsibility and the highest remuneration. The violinists who sit next to and in the stand in back of the concertmaster are ranked as associate and assistant concertmasters, earn overscale pay in comparison to the remaining section players as these 'associate-assistants' are required to take over the leader position if circumstances require substitution.

The terminology at Dutch orchestras provides an accurate description of these associate-assistants (plaatsvervangende eerste en tweede concertmeesters, replacement first and second concertmasters). The remainder of the string sections (second violins, violas, cellos, and basses) are led by principal and assistant principal players.

²⁰⁷ 'Publicly' refers to, 'aurally, during rehearsals.' While commentary abounds especially when a section player disagrees with the musical direction given by the leader, nonetheless, commentary is discouraged and kept to a minimum in the interest of rehearsal efficiency. Of interest to note, U.S. orchestras observed are much more 'silence-oriented' than their chatty European counterparts.

²⁰⁸ The first violin parts are uniform with the notable exception of solo parts specially annotated in the score in which several players or the concertmaster-as-soloist plays a different line.

Regardless of the orchestra's homeland, seating within a string section varies according to a particular orchestra's custom: traditions are tied to history not location. In most ensembles, section players aside from the aforementioned subsets of principal players are not necessarily seated according to rank. In many orchestras in the U.S. and the Netherlands with 'fixed seating', auditions are held for a specific 'seat' in the orchestra (for example 'fifth stand, outside player'). In other orchestras, the most recent audition winner for a string section place sits at the back of the section. "Off the record but true, many of our strongest players sit in the back of the section as a result of string section auditions that stipulate a particular seat."²⁰⁹ To confuse matters a bit more, in other orchestras, section players rotate. This means the young player who was seated at the front of the section for concert A might rotate to the back of the section for concert B. Examples of top-tier string seating in the U.S. and the Netherlands show variations:

The New York Philharmonic uses the revolving seating method for section string players who are listed alphabetically in the roster.

The Philadelphia Orchestra: some members of the string sections voluntarily rotate seating on a periodic basis.

The Los Angeles Philharmonic string section utilizes revolving seating on a systematic basis. Players listed alphabetically change seats periodically.

In those sections where there are two principals the musicians share the position equally and are listed in order of length of service.

The Hague Philharmonic orchestra first violin section 'Je plek binnen de groep rouleert per productie' (Rotating section: the musicians placement changes per production, translation from Dutch by the author).

5.5 Contracted players and pay raises

Within most organizations, salary compensation structures are divided into pay scales and pay spines. Pay scales are comparative and show what an employee who performs similar work at a different parallel organization, whereas the pay spine shows rates of pay for employees with respect to factors including pay increases after time and pay associated with different levels within an organization. Regardless of terminology, a closer look at pay spine determinants for orchestral musicians in the United States and the Netherlands show that musicians who enter orchestras as rank-and-file payers (U.S. terminology 'section' players as opposed to higher paid 'principals' 'leaders' or other 'named and ranked positions) benefit from limited progression along pay spines. Salary gains might be found if there is cost-of-living salary adjustment but otherwise pay scales are graded according to years-of-service and not according to other merit-

²⁰⁹ Conversations with Robert Davidovici former concertmaster Vancouver Symphony Orchestra, and Osaka Philharmonic.

based components. Even for tenured orchestral musicians, the chance for significant 'advancement' is limited in the orchestral profession. To make the leap from section player to principal involves participation in the highly competitive audition process and "perhaps the toughest thing a musician could ever undertake is playing for his/her colleagues at an audition, a real 'no mercy' situation. If one fails, you get to face all your colleagues at work at the next morning's rehearsal."²¹⁰

Standard U.S. orchestral CBAs and Dutch CAOs clauses contain variations that define principal players:

*"A 'principal position' is defined as 'the first chair position in each of the following sections': 'first violin, second violin, viola, cello, double bass, flute, oboe, clarinet, bassoon, horn, trumpet, trombone, tuba, tympani, percussion, and harp.'"*²¹¹

To outsiders, the orchestral workplace might seem confusing in terms of hierarchy and succession. In contrast to the corporate world where the 'line of succession' is often clear, orchestra subprincipals hold titles such as associate, assistant and even assistant associate and first associate principals.²¹² Importantly, these players do not automatically become principals unless of course they win the audition for a principal position and their salaries do not reach the 'personal negotiation' level attained by the principals.

As subsequent analyses of case law will illustrate further, principals are important not only in terms of their musical responsibilities based on the composer's score but also in terms of their powers as section leaders. Often principals assert leadership when differences of musical opinions such as how to interpret the conductor's demands come to the fore to ensure uniformity of execution and sound within the group. Needless to say, the principal players exercise considerable influence as to who is suitable to join 'their' section during the audition process. *Of Rowe and race* underscores the fact that certain individual principal orchestral musicians, commonly in top-tier U.S. orchestras, negotiate separate terms specific to their personal contracts exemplified by overscale remuneration. Section players, however, receive CBA determined scale wages. According to Dutch CBA information, principal pay is regulated contractually and capped at approximately 20% 'overscale' in comparison to section players. RCO principals who chose to speak off-the-record have revealed that some degree of

²¹⁰ Conversations with a member of the Royal Concertgebouw Orchestra (RCO) post-principal audition, anonymity assured.

²¹¹ See, for example, see art. 3.1.c(1) Colorado Symphony CBA 2017, available upon request at ICSOM.

²¹² Consult the roster of top-tier U.S. orchestras.

overscale compensation takes place over and above the CBA norms, yet the amounts referenced in the ‘Of Sports and Music’ section above, do not come close to U.S. top-tier scale wages.

5.6 ‘An orchestra is an orchestra’ in terms of employment conditions and the ‘way they work,’ right?

The broad observation “an orchestra, is an orchestra”²¹³ holds validity in terms of generic characteristics related to a musician ‘playing’ on the orchestral team. The systems integral to operating and paying the orchestra, however, reflect national differences. The orchestral systems in the U.S. and the Netherlands showcase the industrial relations characteristic of each nation’s labor traditions. In other words, although the orchestra might play the same repertoire, consist of a similar number of employed musicians, and operate according to parallel historic norms, there are real differences not only in financing but also in worker representation and collective bargaining conventions.

5.6.1 Strings attached: the professional orchestral workplace in the U.S.

The relationship between orchestral management and orchestral musicians are contractual relationships set out in a Collective Bargaining Agreement (CBA) often referred to as a Master Agreement applicable to the contracted musicians and negotiated between the union, representatives of the orchestra and management.²¹⁴ Typically a CBA covers a 3-year period and generally, the musicians’ union represents U.S. musicians with bargaining powers granted to the local branches, referred to as the ‘local.’ Virtually all of the orchestra musicians in the U.S. are employed under the terms of a CBA with notable exceptions in the Pacific Northwest where several orchestras crafted their own type of union organization to be discussed in a paragraph below, *Beyond the Union in the U.S.: A Northwestern alternative*.

In the U.S., the process by which CBAs are negotiated and administered, and the behavior permitted and/or required of all those involved, are governed by a sub-set of employment law, which is known colloquially as “labor law.” The federal National Labor Relations Act (NLRA)²¹⁵ governs collective bargaining between unionized employees and employers with notable exemptions such as the ‘supervisory’ exception that will occupy much of the discussion in a subsequent *movement*.

²¹³ Quote by Itamar (Tomi) Shimon, first violinist, Rotterdam Philharmonic Orchestra known for his witty remarks, paraphrasing Gertrude Stein, *supra* at fn. 6.

²¹⁴ In fact, U.S. orchestral CBAs are often referred to as Master Agreements.

²¹⁵ Cited as, National Labor Relations Act; NLRA; 29 U.S.C. §§ 151-169.

5.6.2 Worker participation in orchestras

The orchestral work arrangement in which the conductor controls a mass of musicians with a wave of the baton appears to outsiders as the epitome of an old-fashioned hierarchy in which musicians hold limited powers. “That’s just what the audience sees on the outside. Remember, the orchestra is a collective committed to expression, to music-making. Yes, the conductor shapes phrases and gives cues but we contribute not only with our musical abilities but also as real participants in the collective, just wait until collective bargaining for a new CBA begins!”²¹⁶ Nonetheless, looking from the outside in, there are differences that deserve mention with regard to U.S. and Dutch orchestras in terms of what academics call ‘industrial democracy’ with respect to worker participation.²¹⁷

On the one hand, Dutch orchestral musicians,²¹⁸ like all members of ‘companies’ who have more than fifty employees enjoy a form of democratic representation. “Works councils where elected employee representatives that sit at the table with management go beyond chit chat to advise and consult. With regard to important management decisions, we hold not only consultation rights but approval rights for issues that affect employees.”²¹⁹ On the other hand, it could be argued that democratic legitimacy is built into the U.S. union certification system. “Once they [union] has won an election and are certified as legal bargaining representatives, American unions have the legal right to insist that management bargain with them over. . . practically everything covered in the contract.”²²⁰

Whereas collective bargaining in Europe is commonly conducted on an industry-wide basis, in the U.S., SCOTUS has upheld the notion of distinctions between mandatory, permissive and illegal subjects of bargaining as specified in a 1981 holding: “Congress had no intention that the elected union representative would become an equal partner in the running of the business enterprise.”²²¹ The National Labor Relations Board (NLRB) guidelines as to subject matter in each category show that a thin fine line could

²¹⁶ Conversations with Cleveland Orchestra members.

²¹⁷ A brief encounter with the Sage journal *Economic and Industrial Democracy* first published in 1980 provides ample examples of industrial democracy at workplaces throughout the world.

²¹⁸ Apart from the RCO that takes its own approach to musician participation, discussed elsewhere in the research.

²¹⁹ Conversations with Dutch orchestral ondernemingsraad (OR) works council members, *Wet op de ondernemingsraden* available in Dutch at: <https://wetten.overheid.nl/DCCBR0002747/2019-01-01> and available in English on the Dutch Social Economic and Council (SER) website at: <https://www.ser.nl/-/media/ser/downloads/engels/2019/works-councils-act.pdf>

²²⁰ See, George Strauss. “Worker’s participation in the United States” 1987 p. 16.

²²¹ *First National Maintenance Corp. vs. NLRB* 452 U.S. 666 (1981).

be drawn between the three categories and specific rules applied to each category.²²² For example, changes cannot be made to a mandatory bargaining subject on the part of the employer unless the union is given prior notice pre-bargaining. Employers and/or unions cannot refuse to bargain over mandatory subjects related to employment, inter alia., benefits, wages, not to speak of initiating industrial actions such as lockouts and strikes.

Volumes have been devoted to the many ‘flavors’ of bargaining at the U.S. workplace from 19th century guidelines to weekly blogs devoted to the ‘machinery’ of bargaining at the present time.²²³ Of special interest to orchestral bargaining in the U.S. has been a focus on what academics and orchestral managers found to be the highly desirable form of ‘soft-touch’ bargaining adopted with the encouragement of Professor Mnookin by the San Francisco Symphony in the bargaining cycle that followed a bitter ten-week strike.²²⁴ From inside the symphony and its committee:

“The 1996 negotiation was extreme, and using Interest Based Bargaining (IBB) was viewed as extreme by many members of the orchestra, and I presume some of the Administration and Board as well. The 2005 negotiation featured a struggle between the orchestra members who wanted to proceed again (as planned) with IBB and the ones who did not trust the process and wanted to dump it. The dumpers won, I was on the committee, and it was the most difficult time of my career. As you might remember, it was not long afterwards that I was playing with an orchestra in Spain. Anyway, the use of IBB was more or less an aberration: before and after we have used the typical adversarial negotiations with varying degrees of success.”²²⁵

Managers place a great deal of emphasis on management-rights clauses within CBAs. A standard clause such as, “[R]etains the sole and exclusive right to manage; to direct its employees; to evaluate performance . . . to discipline and discharge for just cause, to adopt and enforce rules and regulations and policies and procedures; [and] to set and establish standards of performance for employees”²²⁶ presents the employer with the right to take action on certain terms of employment, evading the obligation to bargain with the union. “These clauses are often broad enough to cover situations in which management has to move quickly on a subject, however it is difficult to determine

²²² See a complete listing of subjects of bargaining at: <https://www.usw.org/workplaces/public-sector/2015-conference-material/5-Subjects-of-Bargaining.pdf>

²²³ Voices from the 19th century, Sidney Webb and Beatrice Webb. “The Method of Collective Bargaining,” *The Economic Journal* Vol. 6 No. 21 March 1896 pp. 1-29 to the 21st century array of bargaining styles, see <https://businessjargons.com/types-of-collective-bargaining.html>

²²⁴ See, Robert Mnookin with Gary Friedman and Joel Cutcher-Gershenfeld. “A New Direction: Transforming Relations within the San Francisco Symphony” 2001, pp. 1-26. Available at: http://www.polyphonic.org/wp-content/uploads/2012/03/New_Direction_SF.pdf

²²⁵ Conversations with Steven Braunstein.

²²⁶ Standard U.S. management-rights clause.

where the permissible management action crosses over into a no-go area.”²²⁷ In 2016, the NLRB held that an employer is required to provide considerable specificity in a management-rights clause before the Board will find that the union unequivocally waived its right to bargain over the action in question.²²⁸

5.6.3 What makes the Dutch orchestral workplace different?

As mentioned above and painted with a broad brush, Dutch orchestras have been shaped by a strong tradition of codetermination and employee involvement supported by government and local (both provincial and municipal) subsidies. National ‘sectoral’ agreements, orchestral CAOs are bargained between union representatives and orchestral management in concert with the individual orchestra’s Works Councils, composed of elected musician members.²²⁹ As closer examination of post-crisis orchestral cuts on the Dutch front will show, although Dutch musicians and their orchestras face comparable challenges to those of their U.S. counterparts, there are marked differences in financing and the role of the board.

5.7 What is a major or top-tier orchestra?

Orchestral musicians perform in professional ensembles that can be differentiated in terms of size, ‘reach’ and salary. Major or top-tier orchestras are identified by size, reach and salary in addition to music critics’ appraisals of that very subjective category, ‘international success.’²³⁰ While the RCO²³¹ was ranked by *Gramophone* magazine as the world’s best orchestra in 2008,²³² the winner in 2019 was the Hong Kong Philharmonic, the first Asian orchestra to win such an accolade.²³³ For comparative research purposes, less than a dozen critics who often hold strong subjective bias with regard to their ‘favorites’ should not be the final arbiters of the differences between major and ‘other’ orchestras. Perhaps a fairer way to differentiate between orchestras

²²⁷ Conversations with U.S. labor lawyer specialized in orchestral employment, Kevin Case, 2016.

²²⁸ *Graymont PA Inc.* 364 NLRB No. 37 (June 29, 2016).

²²⁹ The Dutch equivalent to a Collective Bargaining Agreement (CBA) is the Collectieve arbeidsovereenkomst (CAO).

²³⁰ “World’s greatest orchestras’ listing that placed the RCO as number 1 was adjudicated by eleven music critics mainly European. *Gramophone* 2008. See, <https://www.thoughtco.com/worlds-best-orchestras-724384>

²³¹ Formerly known as the Concertgebouw Orchestra, the ensemble received the appellation ‘Royal’ during its 100th year anniversary celebration in 1988. Interesting to note, the Royal Concertgebouw Orchestra has taken the decision to drop the ‘Royal’ appellation while touring as of 2019, the addition of Royal is perceived of as ‘overly exclusive.’

²³² “The World’s Leading Critics Rank the World’s Leading Orchestras” *Gramophone*, December 2008 available at: <https://www.gramophone.co.uk/editorial/the-world%E2%80%99s-greatest-orchestras>

²³³ Of interest, the Music Director credited with raising the Hong Kong Philharmonic to its exalted level is the Dutch conductor, Jaap van Zweden, a former Concertmaster at the RCO.

can be taken from the International Conference of Symphony and Opera Musician (ICSOM) consortium of orchestras that differentiate between the orchestras that offer tenured full-time employment to musicians and part-time orchestras that offer per-service payments to a core of musicians and freelancers.²³⁴ Again, the definition of what constitutes ‘full time’ is open to further delineation²³⁵ but does serve as a better point of departure than the biased *Gramophone* criteria.

5.7.1 Does top-tier ranking grant the RCO a ‘unique’ status?

The Amsterdam-based RCO operates under a unique governance system. Although Dutch legislation mandates the formation of a works council for all enterprises with fifty or more employees,²³⁶ the RCO, “unique in many ways”²³⁷ is organized as a foundation operating independently, “outside of but respectful of” the co-determinative system in place at all other Dutch orchestras. Unlike all other Dutch orchestras, RCO members do not elect colleagues as representatives at a Works Council: RCO musicians are empowered through board membership. Eleven members take their places on the board (Verenigingsbestuur) with three positions occupied by musicians elected by their fellow orchestra members.²³⁸ At the top of the operational pyramid, a triumvirate of administrators, a Managing Director, a Director of Business Affairs and Media, and a Director of Artistic Affairs²³⁹ take charge of managerial, financial, and artistic duties.

Decision-making in the orchestral setting differs between the U.S. and the Netherlands. In the Netherlands, pay and certain specific benefits exemplified by sick leave, free days and pension are regulated by sectoral agreements. In the U.S., beyond federal and state legislated minimum requirements “benefits and pay are the main points of bargaining contention, what makes for fists pounding tables as orchestras negotiate pay, pensions, and all the key employment issues every few years.”²⁴⁰

5.8 No one size fits all: disharmony at the bargaining table

In the U.S., the orchestral CBA sets forth a contract between the employer and the negotiating union, the local affiliate of the American Federation of Musicians (AFM).

²³⁴ Consult the ICSOM website at: <https://icsom.org/orchestras/>

²³⁵ The number of weeks is less significant than the annual minimum salary as some 52-week orchestras pay less than 40-week season orchestras according to U.S.-based League of American Orchestras, see <https://www.americanorchestras.org/>.

²³⁶ Article 2, Dutch Works Councils Act (*Wet op de ondernemingsraden*) [WOR] 1998.

²³⁷ Conversations with Joel Fried, Artistic Director RCO.

²³⁸ The RCO board is its Verenigingsbestuur, see, <https://www.concertgebouworkest.nl/en/staff-board>

²³⁹ <http://www.concertgebouworkest.nl/en/orchestra/Staff/>

²⁴⁰ Conversations with Jonathan Sherwin.

It came as a great surprise to discover that many U.S. professional orchestral musicians assumed that the CBA arranged the relationship between management and musicians. This particular section heading deserves emphasis as negotiations at the U.S. orchestral workplace have changed and are changing dependent on financial issues and the introduction of new 'players' within the bargaining process. From a 'servant of the music, servant to the maestro' pre-1960s, U.S. musicians moved from an invisible role in deciding crucial employment issues to playing a defining role. A short summary of high points from the struggle for musicians' participation ensues with the caveat that a fuller inquiry into the transformative process would call for a future research project of great depth.

Prior to the 1960s, the watershed decade for U.S. orchestras, orchestral musicians in one and only one orchestra, the Boston Symphony Orchestra (BSO) took part in contract negotiations alongside union reps. It was unheard of to have attorneys at the negotiating table, and final contracts were not subject to players' approval. The archives of major U.S. orchestras exemplified by the considerable online offerings available on the New York Philharmonic's library website offer ample documentation to support the statement that musicians were indeed subordinates not only regarding their individual employment but regarding basic collective issues such as salary, work schedules and holidays.²⁴¹

5.8.1 The final arbiter when orchestral musicians litigate?

For U.S.-based orchestral musicians, the role of the NLRB whose jurisdiction under the NLRA covers all establishments whose operations affect interstate commerce (with the limitation that such commerce exceeds a minimum level) is of paramount importance as subsequent *movements* reveal. With regard to orchestras, "the Board exercises jurisdiction over symphony orchestras which have a gross annual revenue from all sources (excluding only contributions which are because of limitations by the grantor not available for use for operating expenses) of not less than \$1 million."²⁴² The road to collective bargaining for orchestral musicians in the U.S. was rocky to say the least following the amendments to the NLRA under the Taft-Hartley Act (THA),²⁴³ a subject that will be fully explored in subsequent *movements* focused on U.S. case law related to orchestral musicians. Although orchestras were unionized by the mid 20th

²⁴¹ See, Constitution of the Philharmonic Society of New York, adopted April 1842. *Epilogue, Appendix 4.*

²⁴² See, National Labor Relations Board Rules and Regulations, §103.2 published at 38 F.R. 6176.

²⁴³ 29 U.S.C. §§141-197, the Taft-Hartley Act 1947 also referred to as the Labor Management Act. This Act amended the NLRA, establishing a series of unfair labor practices for unions and restricted supervisors from NLRA protection amended the NLRA, restricted its reach and set forth a series of unfair labor practices.

century and a closed shop principle of ‘no union, no orchestral membership’ prevailed, the orchestra as a nonprofit organization was effectively barred from NLRA coverage until the now defunct Rochester Symphony was beset by unfair labor practices and the NLRB reversed its previous rulings by deciding to include orchestras into its ambit.²⁴⁴

A revelatory piece of jurisprudence from the U.S. heartland in which Cleveland Orchestra musicians sought protection under the equal rights clause within the U.S. labor relations code²⁴⁵ illustrates the march forward for union protection for musicians.²⁴⁶ Germane to an understanding is that fact that the union local was the established bargaining agent for orchestra members. All members were entitled to vote on any part of the local’s bylaws and wage scales (the hourly rate for musicians). Prior to the litigation, the orchestra members had moved to amend the union bylaws in order to allow the musicians to vote on CBAs before the employer would be permitted to execute the contract. The executive board of the local union agreed to adopt the musician’s suggestions during CBA negotiations but reneged on this promise in December 1960. Filing suit pursuant to unfair practice, the musicians argued that unionized musicians should only work under wage scales that they had previously agreed on. The court upheld the musicians’ rights under the NLRA.

5.8.2 Have musicians united to form platforms beyond the union? ICSOM, ROPA and the Dutch-based Platform voor Orkest Musici (PvFM)

Spurred on to take additional action, Gino Raffaelli, a Cleveland Orchestra violinist-soon-to-become-activist and a founding member of the International Conference of Symphony and Opera Musicians (ICSOM), decided that this disregard for what should have constituted basic rights for musicians was tantamount to a call for action.²⁴⁷ “The events in Cleveland in those years, the lawsuits and the counter lawsuits served as the most compelling evidence for the need of an auxiliary organization – one within the union – to represent the interests of the symphony musician, a role so aptly filled with the birth of ICSOM.”²⁴⁸ Another important reason that led to the formation of a

²⁴⁴ 82 L.R.R.M. 1519 (1973).

²⁴⁵ National Labor Relations Act Title 29 U.S.C. 411(a) (1):

“*Equal rights.* Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization’s constitution and by-laws.”

²⁴⁶ *Cleveland Orchestra Comm. v. Cleveland Fed’n of Musicians, Local No. 4* 303 F.2d 229, 230 (6th Cir. 1962).

²⁴⁷ A copy of the first Symposium of Orchestral Delegates 1962 records the extensive number of subjects covered at that precursor to ICSOM from labor dispute-related issues and pensions to a consideration of the Goldberg Arbitration and litigation related to the Cleveland Orchestra, see *Epilogue: Appendix 5*.

²⁴⁸ Conversations with Randy Whatley, U.S.-based orchestral media advisor; President Cypress Media Group 2016.

lobby group that put the demands of orchestral musicians at the fore went beyond the frustrations of a lack of 'voice' at the workplace. "Simply put, most orchestral musicians in the U.S. in the early 1960s did not earn an adequate living."²⁴⁹ Statistics released by the U.S. census in 1963 disclose that the average orchestral musician's salary was (\$4,757 per annum) well below the median salary of other professionals (\$6,778).²⁵⁰

"To raise our voices beyond the backstage labyrinth, we needed to find a common ground, a way to join forces with other musicians who faced what seemed to be insurmountable challenges. Never forget, our working conditions and payments were decided upon by a consortium of boards, authoritarian conductors and well, you know, managers of different backgrounds who did not approve of musician's organizing. Also, as you consider Europe's orchestras where pensions and holiday time is determined by the state, always remember, U.S. musicians did not have those luxuries: we had to fight for every free day, every penny of our pension."²⁵¹

In 1964, ICSOM was actively involved in an orchestral musicians' employment conflict. Several players with the San Antonio Symphony (SAS) lost their jobs in retaliation for their active participation on behalf of their fellow musicians. "It was a case of the usual suspects: an autocratic conductor, repressive management and a local that was too weak to stand up to those who ran the only orchestra in town."²⁵² ICSOM was pivotal in its precursor of a social media campaign, a 'name and shame' operation that put pressure on the SAS. The musicians were never reinstated but did receive \$4000 in reimbursement equivalent to approximately \$32,000 in 2018.²⁵³

"Originating as a dissident group of disgruntled symphony musicians in 1962, ICSOM has become perhaps the single most powerful force in the American Federation of Music (AFM)"²⁵⁴ At present, ICSOM is a thriving representative conference that provides professional orchestral musicians in the top 52 U.S. orchestras with a platform to revisit every conceivable employment-related issue from auditions to conductor evaluations and provides invaluable information and support in negotiating contracts and applying for strike funds. ICSOM was the first of the currently active five player conferences that operate under the aegis of the AFM.

The U.S.-based Regional Orchestra Players Association (ROPA) represents approximately 90 orchestras with similar goals and services as ICSOM whereas the other players

²⁴⁹ Conversations with ICSOM pioneer and Cleveland Orchestra violinist, Gino Raffaelli.

²⁵⁰ Data available at: <https://www2.census.gov/library/publications/1963/demographics/p60-41.pdf>

²⁵¹ Julie Ayer, *supra* at fn. 77 for a superb anecdotal history of the seismic changes wrought by ICSOM and musicians' conferences.

²⁵² *Ibid.*,

²⁵³ See "The Bob Danielson Case" October 1968 p. 5. Available at: <https://icsom.org/senza/issues/senza071.pdf>

²⁵⁴ Julie Ayer, p. 235.

conferences represent three other core groups: theater musicians, recording industry artists and Canadian orchestras. Although some of ROPA member orchestras hire a core of tenured players supplemented by freelancers, there is no specific conference that caters specifically to the needs of the non-tenured, independent contractors. Turning to the Netherlands, there are no players conferences comparable to the ICSOM/ROPA organizations for Dutch orchestral musicians aside from the unions with one notable exception. The *Platform voor Freelance Musici* (PvFM) founded in the Netherlands in 2018 focuses exclusively on the needs of the most precarious orchestral players, freelance substitute musicians and shares several notable traits with U.S. players conferences in terms of visibility and outreach. The remarkable contributions of the PvFM in tackling freelancers' vulnerabilities will be discussed in several subsequent *movements* (*A long and winding road* and *Coda: Quo Vadis?*).

5.9 Who pays for an orchestra?

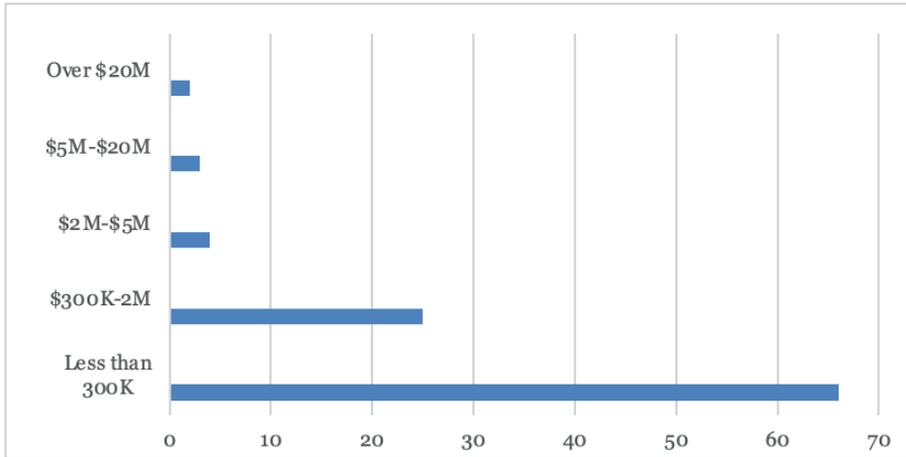
*“The U.S. is the only country in the world today where the fortunes of most symphony orchestras depend on the generosity, the wisdom, the enthusiasm, indeed the musical tastes and policies of bankers, oil men, meatpackers, merchants and housewives.”*²⁵⁵

*“In practically all of the civilized nations of the world, the United States excepted, symphony orchestras and opera companies are given government support, and this is a tradition of hundreds of years standing.”*²⁵⁶

Despite the non-politically correct notions of ‘civilized nations’ and ‘oil men,’ there is more than a grain of truth from the quotes above, which date back to the late 1960s and 1970s. In later junctures in this research, the financial sources of the orchestra in the 21st century will be examined through several lenses, a criticism of U.S. nonprofit boards during crisis periods at the orchestra, a reconsideration of the Baumol-Bowen ‘cost disease’ theory and its effect on the orchestra and an examination of ephemeral subsidies post-crisis. For a FAQ section, other answers are needed to supplement ‘the way they play’ with ‘the way they pay.’ Most people who posed the questions that inform this *movement* believe that orchestras pay a good deal of their own expenses. Ticket sales for concerts and tour revenue would to be the answer however, whether researching Dutch or U.S. orchestras, ticket sales account for less than 30% of an orchestra’s budget, and most tours bolster the orchestra’s renown rather than earn

²⁵⁵ Ernest Fleischmann served as Director of the Los Angeles Philharmonic from 1969-1998. The quote was originally published in *High Fidelity* 1969, requoted in *The Guardian* 15 June 2010, Ernest Fleischmann obituary. Available at: <https://www.theguardian.com/music/2010/jun/15/ernest-fleischmann-obituary>

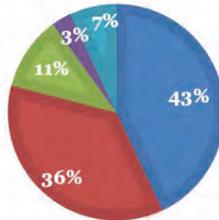
²⁵⁶ Hope Stoddard. “Subsidy under the American System” in George Selzer’s *The Professional Symphony Orchestra in the United States* 1975 p. 390.



If ticket sales cannot pay for an orchestra, what does cover the costs?²⁵⁷

SOURCES OF U.S. ORCHESTRAL REVENUE

■ Private ■ Tickets etc ■ Endowment ■ Government ■ Spinoffs ■



significant amounts of revenue.²⁵⁸ Notable exceptions can be found in the present-day top-tier orchestras who tour and offer residencies in the more 'lucrative locations'²⁵⁹

²⁵⁷ Ibid.,

²⁵⁸ Statistics gleaned from the Jaarverslag Rotterdams Philharmonisch Orkest (Annual Report Rotterdam Philharmonic Orchestra 2014) are used as representative of a top-tier, touring Dutch orchestra and show approximately 25% income from ticket sales and other public revenues, including tours. For U.S. statistics (2014) see, the League of American Orchestra reports available at: <https://www.arts.gov/sites/default/files/Research-Art-Works-League.pdf>

²⁵⁹ Subtly put, "some markets pay more for tours than others. A U.S. orchestra almost has to pay its own way to be showcased at the Concertgebouw Hall but can easily balance that expense with concerts in a well-paying location," according to impresario Marco Riaskoff corroborated by orchestra managers.

including China, Japan, and most recently the Arab peninsula, much akin to a trend set by international football teams.²⁶⁰

Recent statistics supplied by the League of American Orchestras show that top-tier orchestras account for a mere 2 percent of the 1600 orchestras operating in the United States. The wide disparity in budgets, (over \$20 million for the top-tier) can be extrapolated from the chart below.²⁶¹

U.S. Orchestral Budgetary categories expressed in % (data released 2016-2017)

The short answer is that while U.S. orchestras depend on endowments, corporate sponsorship, and individual donors with a limited amount of funding from municipal and/or state sources, European orchestras are primarily state funded with different governance factors in place. The Vienna Philharmonic Orchestra, the Berlin Philharmonic, and the major London orchestras are examples of self-governing orchestras to be touched upon in later *movements*. In terms of ‘running the show,’ the leading Dutch orchestra, the RCO has taken its own route: the only Dutch orchestra to operate without a works council. At the RCO three musicians serve as board members in a modified self-governing system.²⁶²

5.9.1 How are orchestras financed in the Netherlands?

Contrary to the U.S. cultural support system strongly rooted in private and corporate philanthropy, orchestras in the Netherlands like other European cultural organizations are primarily financed through public sector subsidies in a mixed bag of state and municipal subsidies. The principal orchestras gain funding through the BIS, the basic infrastructure subsidies that provide the endowment for an ‘ever shrinking’ number of orchestras. Dutch radio orchestras founded at the end of WWII²⁶³ were funded traditionally through radio and tv license fees and the public media budget. The demise of government funding for public broadcasting in the Netherlands is a book unto itself and is the focus of the *Requiem for an orchestra movement*. There was a

²⁶⁰ The Cleveland Orchestra will present four concerts in the United Arab Emirates in 2020 and members of the Royal Concertgebouw Orchestra (RCO) performed in Abu Dubai in 2017.

²⁶¹ For further information: https://americanorchestras.org/images/stories/Orchestras_at_a_glance/Orchestras%20at%20a%20Glance%202020.pdf

²⁶² See, <https://www.concertgebouworkest.nl/nl/governance>

²⁶³ To refresh memories, the five Dutch radio orchestras founded in 1945 have endured multiple reorganizations. Of the original 1945 orchestras: Metropole Orchestra; Radio Filharmonisch Orkest (Netherlands Radio Philharmonic Orchestra); Radio Kamer Orkest, (Netherlands Radio Chamber Orchestra); Omroep Orkest, Promenade Orkest (the Omroep and Promenade Orchestras fused to form the Netherlands Radio Symphony Orchestra in 1985) and subsequently the Netherlands Radio Symphony was disbanded in 2005. Two radio orchestras remain post 2012-2013 reorganization: the Netherlands Radio Philharmonic and the Metropole Orchestra.

direct correlation between media budget cuts and the dismantling of the broadcasting authorities' respected music ensembles with special emphasis on the 2012-2013 cuts. "The formula was as simple as it was disastrous: in the name of saving public broadcasting, the board of trustees sacrificed the orchestras. The truth can be that crude."²⁶⁴

Of specific interest within a FAQ section are the changes in overall cultural policy related to arts funding in the Netherlands with special regard to orchestral funding. Reacting to the financial crisis with a call for increased 'entrepreneurship' on the part of orchestras (and by extension other cultural organizations) and linking national resources to the need for 'other players' to step in and support the arts (other players serving as a euphemism for private giving), the approach reflected an "Americanization" of Dutch cultural policy.²⁶⁵

This move from a dependency on public funding to a greater dependency on private sponsorship was applauded by the Raad voor Cultuur (Dutch Council for Culture (RvC)), and other stakeholders as a result of drastic cuts, as evidenced by RvC reports (2012-2017).²⁶⁶ Yet, although a call for increased entrepreneurship on the part of those who received subsidies coupled with the RvC's 'Caring for Culture' campaign and its mission to welcome 'a new age of funding based on corporate and individual caring for culture'²⁶⁷ were publicized as the great move forward: statistics gleaned in 2015 verify that private/corporate patronage did not increase significantly.²⁶⁸ The *Geefwet*, (Charitable Giving Law) in force in January 2012 that allowed for increased charitable deductions to cultural organizations at 125% instead of 100% tax deductions for 'regular' deductions²⁶⁹ was touted as the most concrete method to stimulate sponsorship, yet even this measure did not provide the results expected.²⁷⁰ Economic deficits forced the government to tentatively seek supplementary sources of funding for public goods and services. Thus, the government was forced to look to the nonprofit sector for additional resources. In 2011, the government and the nonprofit

²⁶⁴ Conversations with Ben Janssen former Director, Muziekcentrum voor de Omroep (Dutch Broadcasting Music Center (MCO)).

²⁶⁵ In Dutch: *De Staat van Cultuur: Lancering Cultuur-index Nederland*. Boekmanstichting/Sociaal en Cultureel Amsterdam, 2013 and *Meedoen is de Kunst*, Raad van Cultuur, 2014. The latter available at: https://www.cultuur.nl/upload/documents/adviezen/Meedoen_is_de_kunst-def.pdf

²⁶⁶ See, in particular Dutch Raad voor Cultuur. "Advies bezuinigingen cultuur 2013-2016: Noodgedwongen keuzen" 2012.

²⁶⁷ Ibid, "Meedoen is de Kunst."

²⁶⁸ See, Pamela Wiepking and René Bekkers. "Giving in the Netherlands: A Strong Welfare State with a Vibrant Nonprofit Sector" in *The Palgrave Handbook of Global Philanthropy* 2015 pp. 211-229.

²⁶⁹ *Geefwet* (Charitable Giving law) amended and in force 1 January 2012. Available (in Dutch) at: <https://wetten.overheid.nl/DCCBR0030915/2012-01-01>

²⁷⁰ Ibid.,

sector signed a covenant, in which they agreed to collaborate in the provision of public goods and services in the Netherlands. Very clearly, the government seeks collaboration in the funding of the cultural sector - a sector viewed as providing non-essential public goods and services.²⁷¹ The latter part of the sentence is particularly troubling as it refers to the superfluousness of culture post-financial crisis in the vision of the Dutch state, touted in the late 20th century as the archetypical welfare state in which the government watches over public service including cultural assistance and contributions. One of leitmotifs that course through this investigation particularly relevant to the *Requiem for an orchestra movement* relates to political changes of heart that devaluated the importance of culture as a public good in the Netherlands, leading directly to massive culture subsidy cuts.

5.10 Who runs the orchestral show: the troika?

*“Orchestras are structured in a rather dysfunctional way.”²⁷²
“People do not buy tickets for managers to play concerts.”²⁷³*

Henry Fogel, former President of the Chicago Symphony Orchestra, and a prolific pundit on the subject of the orchestral profession masterminded many instructive articles on orchestral administration for the now defunct publication *Harmony*. In an article published at the dawn of the new millennium, he likened the orchestral organization to a three-legged stool in which the music director, the executive director and the board chairman carry equal responsibility for the orchestra.²⁷⁴

In the words of the Harvard psychologist, J. Richard Hackman, who spent decades researching orchestras, “here the answer has to do with the relative amount of “say” of three main leaders of an orchestra – the chair of the board of directors, the managing director, and the music director – hold in orchestra decision-making. Orchestras that operate as especially fine ensembles, those that often play even better than would be expected given the player talent they have to work with, are those where the music director has relatively more influence and authority than the orchestra’s other leaders.”

²⁷¹ See, Wiepking and Bekkers, *supra* at fn. 268.

²⁷² Oft quoted saying attributed to Peter Pastreich, a U.S. orchestral management insider who served as CEO/GM for a plethora of orchestras including: the Kansas City Symphony, St. Louis Symphony and San Francisco Symphony.

²⁷³ Attributed to Tom Morris, former chief executive at the Cleveland Orchestra and previously, the Boston Symphony.

²⁷⁴ See, Henry Fogel. “Are Three Legs Appropriate? Or Even Sufficient?” 2000 pp. 11-34.

When music directors spend considerable amounts of time with their musicians with an ear for active development, the orchestra's playing and even in the musicians' attitude to performance improve, as noted by managers and music critics. Musicians hold a variety of opinions with regard to the 'stay at home' maestro running the gamut from 'we are refreshed by guest conductors who bring new ideas to the fore' to 'the longer the maestro stays away, the more pressure individuals and of course principal players take upon themselves to keep us at our top level.'

Regardless of the lack of agreement that leaves the question above unanswered, there is consensus concerning the inherent, built-in tension to the relationship between the members of the troika. For example, as many cases taken from the orchestral field illustrate, although a solid board of directors can pledge and guarantee the finances that lead to the musicians' well-being, in many situations the board's influence extends into other important areas of the orchestral organization including operational and artistic decision-making.' Turning to the music director in the era of the 'absentee maestro' shows that a knowledgeable and dependable managing director is crucial to set the direction for the orchestral output. The managing director (also referred to as Executive Director, President/CEO and even a combination of the of the three members of an orchestra's leadership troika – the board chair, the music director, and the managing director – are unlikely to be automatically or naturally aligned. Adding to troika-musician tensions is a tendency that has been observed within U.S. orchestral management circles in times of financial crisis. Where old-time managers sought to achieve a balance between musical and financial matters, modern-day executive directors opt to "manage up" currying favor with the board relegating the musicians to second-place.²⁷⁵

5.10.1 Boards and trustees: U.S. style

"Governing boards are the stewards of the public interest."²⁷⁶

While U.S. orchestral boards are central to the well-being of the organization in terms of fund-raising, governance and general stewardship, their Dutch counterparts, are much more behind the scenes.

"Of course, for subsidized orchestras in the Netherlands, fund-raising is not a board responsibility like it is for our colleague-orchestras in the United States. Nonetheless,

²⁷⁵ Conversations with Randy Whatley.

²⁷⁶ J. S. Ott (ed.) *Understanding nonprofit organizations: Governance, leadership, and management 2001* p.5.

*considering the machinations on the part of board members at the Dutch Broadcasting Foundation when the Radio Symphony was cut in 2005 and of course when the Radio Chamber Philharmonic was offered like a sacrificial lamb in 2012, it is difficult to offer a black-and-white, according to the books picture of how a board operates here. Sometimes, the real powers are hidden from view.*²⁷⁷

At many U.S. orchestras post-crisis, “we see a trend repeated over and over again in which orchestras with a committed and unified board can ride the storm while orchestras with boards who perceive the musicians and their needs as subordinate or even, irrelevant to the orchestra’s future.”²⁷⁸ One of the directors of the Canadian musician’s union noted perceptively that orchestral boards have to grapple with governance prerequisites such as accountability, ethics, responsibility and transparency.

*“The issue of governance has been front row centre of all those concerned, around the world, for the last 15 years or so. It found its source in the Enron scandal and collapse. It’s the story of how a darling of Wall street1 went from America’s most innovative company in 1995 to complete demise and even prosecution of its executives in 2002. It forced countries starting with the United States to adopt new regulations in the fields of accountability (and accounting), ethics, transparency, and ultimate responsibility of Board members. Governance crises happen too often at orchestral boardrooms.”*²⁷⁹

Accountability for nonprofits rests squarely upon the shoulders of a board of directors, or in the parlance of some U.S. orchestras, a board of trustees. For a trustee, there are significant legal responsibilities and duties that accompany the position. Although the board delegates management authority to the organization’s CEO, the board holds both fiduciary and legal duties and responsibilities.²⁸⁰ A slim volume that attempted to account for the role of governance at Dutch cultural institutions provides evidence that many board members are male and members of a tightly knit old boys’ network. These factors engendered laissez-faire attitudes at the board level where “lip-service was paid to those who are responsible to delegate subsidies with little effort to take other more serious responsibilities with regard to the orchestral organization.”²⁸¹ Although the book’s title, *Directeuren willen meer* (author’s translation, *Director’s want more*) points to a call for greater consciousness-raising with regard to ‘enlightened’ governance, few

²⁷⁷ Conversations with Kees Dijk.

²⁷⁸ Conversations with Kevin Case.

²⁷⁹ Thérèse Boutin, former CEO Orchestre Symphonique du Québec, Canadian arts management consultant speaking at the FIM International Conference Montreal 2017.

²⁸⁰ Duties denote the federally imposed tax exemptions as well as restrictions whereas responsibilities are standards of conduct determined at the state level. See, Anita Loomis. “U.S. Symphony Orchestra Bylaws: Policy Anomalies and Trends.” Dissertation University of Central Florida 2006. <https://stars.library.ucf.edu/etd/865>

²⁸¹ Conversations with Anton Kok, former Director, MCO (Dutch Broadcasting Music Center) 2005-2013.

concrete suggestions are presented to stimulate bona fide change.²⁸² “At the end of the day, we learn that less is more: board members at cultural institutions in the Netherlands serve in a revolving door manner; one gets appointed to one board and sooner than later, another board beckons. Also, boards within the Netherlands are comprised of an inner circle, an ‘old boy’s network.’ The real challenge is to empower the cultural organization by speaking to a diverse group of stakeholders who are involved in the organization. This takes guts and will power, sometimes hard to come by at the board level.”²⁸³ Governance issues and the disconnect between the key good governance and regulation principles²⁸⁴ enshrined in the Dutch Governance Code for Culture and the way in which these principles were abjured in relation to the 2018 purported #metoo predicament at the RCO will be revisited in a subsequent intermezzo.

*“Only a few arts organizations are managed well, with consistent vigor and focus. Too many of them do too little or no real planning....do not know how to market, are governed by weak or ineffective boards.”*²⁸⁵

As striking examples from recent U.S.-based orchestral debacles confirm, board oversight and even in extremis negligence has contributed mightily to employment woes cross country. An excellent blog post, reprinted in *Epilogue: Appendix 6* crafted by Tom Olcott, Financial Vice-President of Local 802 AFM, provides ample insight into assorted board-related dramas.²⁸⁶

5.10.2 What is the role of the maestro/conductor/music director?

At the crux of the hierarchical relationship at the orchestra is the relationship between the maestro and the musicians, a thread that runs through subsequent *movements* that focus on history and cases related to unfair employment practices. To answer the basic FAQ on the role of the music director: music directors hold the final authority about artistic matters at the orchestra, from the interpretation of the music to employment-related issues such as hiring, tenure and dismissals. Greater details concerning the complexities of the maestro-musician relations are found throughout case-related analyses and in *Haydn rewrites history*.

²⁸² Patricia Maitland. *Directeuren willen meer...directeuren in de cultuursector over de kwaliteit van hun toezicht* privately published in the Netherlands 2016.

²⁸³ Conversations with Jan Willem Loot, director of major Dutch orchestras for decades, Amsterdam Philharmonic Orchestra; Netherlands Philharmonic Orchestra and subsequently, RCO.

²⁸⁴ In the original Dutch, ‘goed bestuur en toezicht’ the title of the Governance Code Cultuur report published in 2014, available (in Dutch) at: www.governancecodecultuur.nl

²⁸⁵ Michael Kaiser, *Curtains* preface, *supra* at fn. 74.

²⁸⁶ See, Tom Olcott. “When Orchestra Boards Fail us” an accurate appraisal of the New York City Opera’s final demise, published 10 November 2013. See *Epilogue: Appendix 6*.

5.10.3 *The ‘fourth’ leg of the stool: the musicians*

While orchestras are characterized by their universal goals of musical performance, variations in size, organizational structure, financial setup, and specific artistic ambitions abound.

*“We, as musicians love and make our lives in the art of music. By the nature of things, the compensation for our labors is not in the meager, monetary return, but rather in the excellence of the performances we give, and the fidelity to our art. We feel that no matter how high the purpose of the managerial board might be, nevertheless, it is only natural that the best interests of the orchestra as an artistic institution should be closer to its members than to anyone else.”*²⁸⁷

Conspicuously missing from the ‘troika’ powers at the helm of the orchestra are the musicians. An article published at the turn of the millennium entitled “Are Three Legs Appropriate? Or Even Sufficient”²⁸⁸ takes a strong stance on the subject of musician representation. “Musicians cannot, in my view, be excluded from issues of governance or strategic planning, or from any major internal debate and discussion undertaken by orchestral organizations.”²⁸⁹ Admirable in sentiment, two caveats arise. Firstly, 21st century orchestral musicians in both jurisdictions researched do participate in their organizations on many levels, from the considerable number of orchestra committees in the U.S. to the Dutch works councils as subsequent *movements* will describe. Secondly, as U.S. case law illustrates, the legal ramifications of representation are all the more complex due to statutory limitations on ‘employees’ who could be categorized as ‘supervisors-managers,’ a subject that will undergo scrutiny in *Back in the USA*.

5.10.4 *What is the role of the orchestra committee?*

Aside from the paucity of self-governing orchestras²⁹⁰ in which members are responsible for every aspect of decision-making, orchestra committee members in both jurisdictions are the musicians’ caretakers and advocates.²⁹¹ U.S. orchestra committees consist of tenured contract musicians who are elected by their fellow musicians for multifarious tasks ranging from personnel-related issues to calls for collective action.

²⁸⁷ Letter dated March 4, 1943 “Statement of the Orchestra Committee of the New York Philharmonic Society to the Board” New York Philharmonic Archives. Available at: <http://archives.nyphil.org/index.php/artifact/94a4f25e-754c-4124-81e2-053612e49c85/fullview#page/48/mode/2up>

²⁸⁸ The article was originally published in the now defunct publication, *Harmony* 2000.

²⁸⁹ *Ibid.*,

²⁹⁰ From the most famous symphony orchestras: Berlin Philharmonic, Vienna Philharmonic on the continent to the selection of London-based self-governing orchestras to many chamber orchestras worldwide, self-governing orchestras are the exception to the rule.

²⁹¹ The names of orchestra committees vary and there is of course, a variance in types of committees from artistic committees to collective bargaining committees. Many U.S. regional orchestras and European orchestras have one centralized orchestra committee sometimes known as the Player’s Committee.

Individual grievances such as discrimination charges or unfair dismissals will be discussed in depth in subsequent *movements*.

In the United States, orchestra committees (the nomenclature varies, inter alia: Orchestra Committee; Players Committee; Negotiating Committee) represent orchestral members in their dealings with management and board. Committee members liaise with the local serving as the union's "eyes and ears on the job."²⁹²

From participation at the CBA table to conflict resolution with regard to employment grievances, U.S. orchestral committee members are actively involved to protect musicians by making sure that CBAs are properly administered. A discussion of the role of orchestral works council members in the Netherlands and other European countries with a co-determinative approach is found in *Requiem for an orchestra*.

5.10.4.1 *What is the relationship between orchestra committees and the union?*

*"One of the most valuable characteristics of the committee system is its flexibility. As priorities change – and personalities, working conditions and employers – so can the system adapt. Since it is merely a framework, it can be made to fit new realities and needs."*²⁹³

In law and in practical terms, the orchestra committee with its mission to represent the interests of the musicians both collectively and individually, takes on the role of the union's representatives in the workplace. Orchestra committees participate in contract negotiation, deal with individual grievances, and play a role in mitigating a range of issues that arise between the musicians and management. "The committees provide boots on the ground, ears and eyes to maintain and update lines of communication with the local [union]."²⁹⁴ Such a description may lead to the assumption that the relationship between the orchestra committee and the local is symbiotic and harmonious yet there is an inherent caveat here as the local holds the legal responsibility to negotiate and administer the CBA but has no influence on selecting the members of an orchestra committee. In situations in which the local and the committee differ with regard to bargaining goals or grievances or many other issues, such differences

²⁹² Chris Durham, AFM Symphonic Services Division Chief Field Negotiator commenting on "Serving on an Orchestra Committee" *The International Musician* June 30, 2017. Available at: <https://internationalmusician.org/serving-orchestra-committee/>

²⁹³ Sara Cutler, harpist, and member AFM Local 802 Executive Board 2011-2018. Served as chair of the NYC Ballet committee and the American Symphony Orchestra committee. Quoted in "Putting Aside our Differences" published by Local 802. *Allegro* vol. 119 no. 9 October 2019. Available at: <https://www.local802afm.org/allegro/articles/putting-aside-our-differences/?fbclid=IwAR1JtbaWjNzrgWx0-vwXsKpAY0r3YFZu31Og0cGFgksZZGBOHVuonKwyPfo>

²⁹⁴ Conversations with Jonathan Sherwin.

of opinion can lead to discord. Generally, employees who work under the terms of a collective bargaining agreement are represented by labor unions a truism that applies to both jurisdictions under scrutiny. In the U.S., the manifold responsibilities of the union are prescribed by federal law and/or set in the AFM's bylaws.²⁹⁵ Whereas the relationship between U.S. orchestra committees and the union, represented by locals, can be turbulent as copious reports from interviewees and sources in the ample historical archives provided by ICSOM's publication *Senza Sordino* and the AFM's monthly, *Allegro* attest, Dutch orchestras tend to liaise with unions through meetings and communique between specific orchestra members (*kaderleden*, best translated as, *officers*) and union representatives.

5.11 The union at the orchestra: U.S. style

Initiated in America's heartland in 1896, the American Federation of Musicians (AFM) first represented 3,000 pioneering musicians in search of protection from unreliable employers on the premise that "all men and women playing musical instruments and receiving pay therefore from the public must, in order to get just wages and decent working conditions form a labor organization."²⁹⁶ By 1913, the union counted 636 groups or 'locals' and more than 64,000 members. An awareness of the complex history of the U.S. musicians union's transformation from a system tradition, in which 'one man dog' tactics exemplified by the actions of the pugnacious union boss James C. Petrillo, (nicknamed 'Little Caesar' the AFM's president from 1940-1958) is crucial to a consideration of present-day orchestral relations in which the input of not only individual orchestral committees but the resilient ICSOM conference are vital to aid in "waging an ongoing campaign for better work conditions."²⁹⁷ Accounts of Mr. Petrillo's battle against the recording industry in the 1940s are thrilling to read in the context of present-day performer's rights with regard to digitized materials.²⁹⁸ Referring to the unfair job displacement engendered by radio broadcasts of recorded works (phonographs) without compensation for the musicians, Petrillo declared:

"Nowhere else in this mechanical age does the workman create the machine which destroys him, but that's what happens to the musician when he plays for a recording. The

²⁹⁵ The AFM bylaws amended in 2016 are available at: <https://www.afm.org/wp-content/uploads/2017/02/AFM-Bylaws.pdf>

²⁹⁶ Founded in Indianapolis, Indiana, the AFM's original mission statement is reproduced on AFM Local 802's website available at: <https://www.local802afm.org>

²⁹⁷ Conversations with Tino Gagliardi.

²⁹⁸ Harvey Mars' tribute in the AFM online publication, *Allegro* and links to other 'takes' on the James Petrillo phenomenon make for wonderful reading, see: <https://www.local802afm.org/allegro/articles/the-silence-was-deafening/>

*iceman didn't create the refrigerator. The coachman didn't build the automobile. But the musician plays his music into a recorder and a short time later the radio station manager comes around and says, "Sorry, Joe, we've got all your stuff on records, so we don't need you anymore." And Joe's out of a job.*²⁹⁹

Since the coming of age of the modern U.S. orchestra in the turbulent 1960s, when collective bargaining and collective representation through powerful orchestral members-only groups such as ICSOM were in their infancy, union membership was the norm for orchestral musicians. To U.S. musicians, the term "the union" refers to the local union in their city, the local union branch affiliated to the AFM. U.S. unions are nonprofits³⁰⁰ charged with the powers to represent workers in their dealings with their employer(s). According to AFM statistics, over 80,000 musicians in the U.S. and Canada, approximately 95% of North America's professional orchestral musicians were registered as union members in 2019.³⁰¹

Almost all U.S. orchestras are 'union' workplaces requiring membership for employees. Even beyond the prerequisite for employment, U.S. orchestral musicians interviewed believe that their membership carries great value. In addition to collective bargaining, the AFM functions as a purveyor of benefits and services for its members.³⁰² Substitute musicians who freelance in U.S. union orchestras also perceive union membership as a positive obligation and do not find that the AFM bylaws that bar union orchestras from hiring nonmembers for employment are unreasonable.

"We sense that in the hierarchy of the orchestra, music directors and CEOs could take advantage of their power if musicians did not have some sort of strong backup: the union has real clout. If you study the AFM bylaws, you discover that nonunion member musicians cannot participate in orchestra meetings dealing with CBA administration nor do they receive strike fund benefits. It's quite simple: U.S. musicians join unions for protection and power!"³⁰³

5.11.1 Beyond the union in the U.S.: a Northwestern alternative

Several U.S. orchestras in the Pacific Northwest are members of *The International Guild of Symphony, Theater, Opera and Ballet Musicians* (The Guild) and not the AFM. The Seattle Symphony, the most prominent amongst the orchestras filed for

²⁹⁹ James C. Petrillo, quoted by Robert A. Gorman. "The Recording Musician and Union Power. A Case Study of the American Federation of Musicians" 1983 p. 763.

³⁰⁰ See, Section 501(c)(5) Internal Revenue Code.

³⁰¹ See, <https://www.afm.org/join/new-members/>

³⁰² The assertion is supported by interviews with U.S. musicians listed in *Recitative: The interviewed*.

³⁰³ Discussions with Martin Andersen, violist New Jersey Symphony; ICSOM Officer.

union decertification in 1988. The standard reason leading to leaving the union, deemed by union supporters as a ‘shameful practice’³⁰⁴ exemplified by the Seattle case was the musicians’ dissatisfaction with the local and its approach to lucrative recording agreements called, Phono Labor contracts. Although Seattle is the most-cited exception to the U.S. tradition of ‘orchestras are union shops’ statement of fact, its ‘nonunion’ workplace is remarkably like a unionized orchestral workplace: “Even non-union orchestras like ours are similar to union orchestras in many ways: we have orchestral committees and many of the same issues for example with music director(s) and management. And yes, our contract does resemble other orchestra’s CBA, it has the same coverage and offers the same conditions.”³⁰⁵

The Guild restricts membership to “orchestral musicians and librarians who are employed by not-for-profit organizations,” and is completely voluntary. Importantly, it attained recognition by the NLRB as a union and has held supervised elections since 1988. Its website informs prospective members:

*“If a worker is covered by a collective bargaining agreement in Washington, the worker is required to pay what are known as “agency fees” to the union to cover the expenses of contract bargaining and maintenance. Washington State law also allows these agency fees to be used for union organizing, arguing that non-members may benefit when a segment of their industry is organized, although such funds have often been used for purposes of raiding other unions in the same industry. The worker must make a decision within 30 days after employment begins whether or not to join the union. Non-member generally means the loss of voting privileges. A worker choosing not to join is known as a “Core non-member.”*³⁰⁶

The Tucson Symphony engaged in a brief flirtation with decertification and left the AFM in 1999 only to return to the fold several years later. As historic irony would have it taking into consideration the *Rowe* gender discrimination case that headlines *Of Rowe and race*, one of the most bitter struggles in 20th century U.S. labor history pitted the BSO against the colorful American Federation of Musicians boss, James Caesar Petrillo in 1942.³⁰⁷ After decades of strife with regard to union membership exemplified by the 1920 strike, the aftermath of which witnessed the departure of 31 orchestral musicians, the BSO finally capitulated and became the last professional U.S. orchestra to become unionized. The beloved Harry Ellis Dickson, a veritable fixture as

³⁰⁴ Comments delivered by Ray Hair, President AFM at FIM International Musicians Conference Montreal 2017.

³⁰⁵ Conversations with Seattle Symphony principal violist, Susan Gulkis Assadi.

³⁰⁶ See, <https://www.igstobm.org/about-igstobm/>

³⁰⁷ See, *supra* at fn. 299. James Petrillo’s so-called ‘Petrillo Bans’ strictly enforced his motto, ‘no canned music, only live.’

BSO violinist and Assistant Conductor of the Boston Pops Orchestra for almost five decades, provides invaluable personal insights as to why the BSO was the last bastion of anti-unionism in the orchestral field.

“We were in the Boston Symphony, which was run by the Boston Brahmins, who hated anything that had to do with unions. Remember that when they heard “union” they heard “communism,” they heard rebellion. And so, when I joined, we were the only American orchestra that was not in the union. Why weren’t we in the union? Because the trustees refused to allow us to be in it. I remember hearing a trustee say, “If you belong to the union, you sort of become a working person, and you’re an artist.” What started us in union was the great Caesar Petrillo. . . He came to one of our concerts. He was a rough guy, but a man with great idealism, and he fought for his ideals. He made it his job to put the Boston Symphony, which was the only big orchestra not in the union, into the union. And how did he do it? By stopping us from recording. He unionized the recording companies. What did the Boston Symphony do? They started to make their own recordings. Symphony Hall was filled up with machines, recording machines, and they were in there for a few months... Until they discovered that without marketing you couldn’t do any (recording). So, they took the machines out and for almost a year we had no recordings. Then Petrillo unionized all the soloists. So, for a whole year we couldn’t play with Jascha Heifetz, couldn’t play with Rubenstein, and none of the great soloists. For a year or so, no soloists, no recordings.”³⁰⁸

5.11.2 Are there differences between the two jurisdictions in terms of union membership?

As mentioned above, the U.S. both at the political and judicial level still registers residual antipathy to unions bolstered by the Right to Work movement, which supports the notion that employees hold the ‘right to work’ in unionized workplaces without actually joining the union or paying regular union dues. A 2018 SCOTUS decision in *Janus v. AFSCME*³⁰⁹ sheds a strong light on the politically controversial matter of whether public employees should be obliged to pay union dues even if they disagree with their union’s standpoints. In a broad interpretation of the First Amendment, the *Janus* majority championed the view that nonunion members are not obligated to pay fees because public sector union fees violate the right to free speech and limit the employee’s freedom of choice. Prior to *Janus*, *Abood v. Detroit Board of Education* held precedential sway for forty years.³¹⁰ In *Abood*, SCOTUS justified public sector union fees arguing that such mandatory payments prevented free riders (nonunion employees) from reaping the benefits of union-bargained contracts.

Justice Elena Kagan’s dissent in *Janus* would provide music to Dutch ears as the

³⁰⁸ Excerpts taken from Harry Ellis Dickson’s richly detailed *Beating Time: A Musicians Memoir* 1995.

³⁰⁹ *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31* 138 S. Ct. 2448 (2018).

³¹⁰ *Abood v. Detroit Board of Education* 431 U.S. 209 (1977).

unions “bargain for all at a workplace regardless of the union affiliations of individual workers.”³¹¹ Justice Kagan argued that *Abood* ensured that the fees collected by unions were levied to cover the costs of collective bargaining, not to cover the costs of any possible union-related political or ideological activities. The dissent critiqued *Janus* for leaving the realities of the workplace behind, “by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.”³¹²

In the Netherlands, unions have played and continue to play a significant role in the civic sphere. Post WWII sustained union involvement characterized the development of strong support for collective bargaining with the unions in an ascendant role in upholding workplace rights. The concept of social partnership between the government, expert groups, employers’ representatives, and the unions contribute to a highly supportive environment for collective bargaining that can be contrasted to the situation in the U.S. where a clash of interests between ‘the right of freedom to contract at will’ is often juxtaposed to the rights of workers not only in the courts but in legislation.³¹³

Unions in 21st century Netherlands face similar challenges to their U.S. counterparts as union density is facing declines based on a complex nexus of reasons which find an excellent presentation in Eurofound’s ample and thorough documentation.³¹⁴ It is important to underline that for all the challenges of maintaining membership density, the coverage provided by collective bargaining is high regardless of a decline in membership as the following statistic illustrates: NL union density measured at 18% in 2011 with lower figures in the orchestral sector (estimated 7%) yet, collective bargaining coverage in the orchestral sector was estimated at 81%.³¹⁵ “The perception that the union bargains for musicians regardless of their union affiliation leads so many Dutch musicians to ask, ‘why should I pay to join the union, if I do not have to?’ The added benefits of union membership have not played a role in musician consciousness for years. This has changed partially because of the most devastating crisis, the COVID-19 pandemic.”³¹⁶ As the *movement A long and winding road* reveals

³¹¹ Conversations with Martin Kothman, senior director FNV Media & Cultuur.

³¹² *Janus*, *supra* at fn. 309.

³¹³ Details concerning court decisions, changes in the legislation (from NLRA to Taft Hartley) will be given pride of place in the pages to follow.

³¹⁴ See, <https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/netherlands>

³¹⁵ Robbert van het Kaar. *Social Partners Debate Collective Bargaining*. EIRO 6 December 2013.

³¹⁶ Conversations with Caroline Cartens, co-founder of the Platform voor Freelance Musici (PvFM).

Dutch union membership in the orchestral sector is on the rise (2018-2021) partially because of the contributions of the PvFM, the Dutch-based alt-labor initiative founded in 2018.³¹⁷

5.12 What are the most pressing issues that face Dutch orchestras post-crisis?

“In a nutshell: survival and healthy and sustainable employability.”³¹⁸

In the Dutch consultative system, union representatives make rounds to test the waters with diverse stakeholders inter alia., orchestra managers, works council representatives, and union shop stewards (*kaderleden*) to solicit opinions concerning proposed CAO changes and canvas opinions with regard to bottlenecks. As state and municipal subsidies have shrunk and competition for limited resources is heightened since the financial crisis of 2007-2008, the Dutch trade unions active in the orchestral field have opted to move towards correcting the shortfall and most egregious inadequacies in employment conditions.

Although a detailed history of cultural trade unions in the Netherlands goes beyond the purview of this research, it is important in the interest of gaining ‘territorial familiarity’ to mention the two main players within the present constellation of Dutch unions: FNV Media & Cultuur (Media & Culture) and the Kunstenbond (Arts Union). No less than thirty major changes (dissolutions as well as mergers) preceded 1 July 2016, the date when FNV KIEM, a direct descendent of the first Dutch trade union, the typographers’ union ANTB (1866) ceased to exist. After members voted in favor of dissolution, a majority of former FNV KIEM members joined FNV Media & Culture that represents members of the audiovisual, graphic arts/pre-publishing, museum, and classical music industry. A smaller group of creative professionals including musicians formed a new union, the Kunstenbond, that remained nominally affiliated to the FNV until January 2020.³¹⁹

³¹⁷ The cooperation between the PvFM and the Kunstenbond will be thoroughly discussed in a *coda*.

³¹⁸ Conversations with Mark Gerrits Kunstenbond union executive. (Nederlands Toonkunstenaarsbond, as of 2018, a subgroup of the Kunstenbond (cultural union) was the oldest union for performing artists in the Netherlands.

³¹⁹ Reading between the lines it is possible to discern competition for membership in present-day Kunstenbond v. FNV Media & Cultuur terms. The FNV affiliate reports a greater number of musician members (radio orchestra musician members remained within the FNV) the ‘partnership’ between the Platform voor Freelance Musici and the Kunstenbond between 2018-2020 was discontinued in 2021, it will be interesting to discern the effects in terms of union membership in the years to come.

To compare to the U.S. stereotype of union executives, trade unions in the Netherlands are more like mediators than classic fist-on-table actors. A word to the wise, although the Dutch system of consultation and counter-consultation seems affable in comparison to the oft-contentious bargaining style in other countries, the most recent CAO proposals, and the reticence on the part of orchestral managers to accept changes proposed by the musicians reflects the fact that both trade unions and their members in the orchestral practice are currently struggling.

In the post-neoliberal age, employers in many sectors are tempted to adopt an entrepreneurship business model that grants them the leeway to lower costs and increase output.

“Their other piece de résistance is the ongoing search to develop new revenue models, not in and of itself unacceptable in times of austerity, however when the revenue model flies in the face of the well-being of orchestra musicians, it is unacceptable. A revenue model in its purest form projects an organization’s potential for growth and profit. In the orchestral sphere, survival is key, no orchestras fall within the classic definition of profit-making enterprises. A model that cuts ‘forfait’ hours,³²⁰ adds extra services to ‘free days’ leads to a slippery slope for employees as demands for more work/less pay are made with an appeal to the musicians’ commitment and professionalism.”³²¹

Employers are demanding even more flexibility from the musicians and musicians are not willing to move forward on flexibility issues because their workload has already reached a high, almost untenable level.

Post 2007-2008 financial crisis, part-time contracts have become the rule rather than the exception across the sector. Dutch unions emphasize the fair labor point of view that holds that CAOs should be restored to the 100% level in order to guarantee a genuine income level that takes rises in the cost of living into account. Although Ingrid van Engelshoven, the most recently appointed Minister of Education, Culture and Science (OCW 2017-2022), has shown some willingness to explore new opportunities for regional orchestras in the short term, a consideration of the financial reality for those orchestras leads to the conclusion that the threats to their survival outweigh the opportunities. Dutch orchestras have entered into an era in which they compete for scarce resources (read subsidies) not only with one another but with other cultural institutions and institutions from other policy areas of which the provincial and municipal governments are responsible.

³²⁰ Here, the term forfait refers to CAO remuneration for individual preparation time, the hours a musician spends to prepare the scores prior to rehearsals.

³²¹ Conversations with Martin Kothman. Mr. Kothman has sat at many bargaining tables pre- and post-crisis. In the original Dutch, the wonderfully descriptive term ‘paradepaardje’ was used.

The post-crisis picture is muted by apprehension for a sector that faces a major 'rethink' on two fronts. First and foremost, the 'subsidy shrinkage' resulting from the devastating cuts in 2012-2013 has reduced the number of orchestras and kindled a competitive atmosphere with regard to 'who gets how much subsidy.' Subsidy cuts in the face of increased production requirements puts an incredible strain on the orchestral musicians who are still employed, many with lowered percentages of employment, and orchestral freelancers now compete for work in fewer and fewer orchestras. Secondly, while Dutch legislation (WAB) which came into effect on 1 January 2020 is oriented towards leveling the playing field between the self-employed and the regularly employed, the element of change poses enormous challenges to orchestral managers: they feel that they are caught between a rock and a hard place to balance budgets and meet requirements to increase the pay scales for freelancers. As questions raised at the end of the *movement* show, there is a great deal of uncertainty concerning the 'reach' of the proposed legislation as 'independent contractors' (Zelfstandigen zonder personeel, *zzp* in Dutch parlance) are exempted from coverage. To clarify, Dutch self-employment status is defined by the Social Economic Council (SER) succinctly: A self-employed person is an independent contractor who does not employ personnel. The Dutch Belastingdienst (Tax and Customs Administration) relies on a multi-pronged definition to ascertain self-employment and further clarifies that it is possible for an 'entrepreneur' to be characterized as such for income tax purposes and/or for VAT refund purposes.³²² Salient features concerning the *zzp* status will be discussed in detail in the *movement* devoted to orchestral freelancers and employment (*A long and winding road*).

5.13 How long is an orchestra's season?

To give a correct answer to this question involves taking several variables into consideration. For example while the ever-shrinking number of 'full-time' Dutch orchestras work a 'full season,' in the U.S. a mere 17 of the 1224 orchestras registered in the League of American Symphony's reports offers a full 52-week paid season; the majority of U.S. orchestral musicians are employed for 40 week seasons.³²³ Some

³²² See the Dutch Belastingdienst (Tax Authority) website for details, in Dutch. Available at: https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/zakelijk/ondernemen/onderneming_starten/voordat_u_start/wanneer_bent_u_ondernemer_voor_de_btw

³²³ An example, the Alabama Symphony: "The 19-20 Alabama Symphony Season is 40 weeks long, September 3 through June 7. It includes 3 paid vacation weeks. Benefits include 100% individual medical insurance, disability, instrument insurance, and pension contribution to AFM-EPF. The 20-21 Season Master Agreement is in negotiation." See, <https://alabamasymphony.org/auditions>

General U.S. orchestral statistics gleaned from the League of American Orchestras website, available at: <https://www.arts.gov/sites/default/files/Research-Art-Works-League.pdf>

orchestras add on 'summer weeks' that include performances at their summer homes and/or add on tour weeks in the summer whereas other orchestras 'go dark' during a summer holiday period in which musicians are not paid and are expected to find work elsewhere. The U.S. orchestras with the longest season in terms of actual number of services is not one of the top-tier orchestras, but the Grand Rapids Symphony.³²⁴ The statistic might infer that the musicians in Grand Rapids earn a substantial salary as a result of a high number of workweeks. The inference is incorrect, as it does not factor in the base salary or the number of paid base vacation weeks that major orchestras offer. The Philadelphia Orchestra offers its musicians the highest number of paid base vacation weeks, meaning that musicians are paid while on holiday, a luxury that is not afforded to the musicians in Grand Rapids.³²⁵ As a reminder to non-musicians, holiday weeks for professional musicians involve daily, focused solo practice: "Remember what Jascha Heifetz taught us, 'If I don't practice one day, I know it; two days, the critics know it; three days, the public knows it.'"³²⁶

5.13.1 Orchestral planning: services and work weeks

In the U.S. and Canada, according to the American Federation of Musicians (AFM) mode, collective agreements are predicated on a service model. The orchestral musician's workweek is calculated in terms of services (rehearsals as well as performances constitute services, with contractually defined maximum hours set for each). Generally, according to the definitions provided in orchestral CBAs: "Services are a unit of work upon which wages are based. Each rehearsal as well as each performance constitutes one service."³²⁷ Exceptions to the general 'service' definition can be found in combination services such as 'back-to-back' educational concerts that take place within a 2 ½ hour time period. The current U.S. maximum is eight services per week comparable to the Dutch maximum. Full-time contracted musicians are paid salaries based on the eight-service week regardless of whether or not all services are accounted for in the work week. While different CBAs show evidence of different forms of daily scheduling, all CBAs limit the number of services per day to two services unlike orchestras in the U.K. where three-call days are frequently the norm.

5.13.2 Dutch orchestras: hours vs. services

An entire dissertation could devote itself to a statistical presentation of the algorithms

³²⁴ Ibid.,

³²⁵ Ibid.,

³²⁶ Quoted by Berlin Philharmonic first concertmaster, Noah Bendix-Balgley.

³²⁷ Definition taken from a selection of U.S. orchestral CBAs generously provided by the American Federation of Musicians (AFM).

that are used to calculate how service minutes/hours are determined. At the time of writing, the Dutch unions are devoting time and energy to negotiate orchestral musicians CAOs with clearly defined 'breaks', pauses in the rehearsal schedule. One of the challenges in negotiating Dutch orchestral CAOs is the switch from counting rehearsals within a schedule to what we call 'urenberekening' determining how hours are calculated and paid for."³²⁸ A point of contention for freelancers and substitute players is that they are paid according to the actual number of services played in their 'work week.' The calculation of what constitutes a service can be a bone of contention for litigation, as illustrated by a mediated dispute, *Kunstenbond v. Netherlands Philharmonic Orchestra* (NedPho) 2020 in which the assessment of rehearsal hours, pre-concert breaks, dress rehearsals, run throughs and the appropriate payments for freelance substitute players forms the basis of the legal issues presented.³²⁹

Post crisis, CAOs in the Netherlands have moved from a service model of calculation to an hourly calculation with extra hours calculated for individual preparation (instrumental practice) time, referred to as the *forfait*. Much controversy surrounds this manner of calculation as musicians perceive the hourly model as an excuse for managers to maximize, or in the words of musicians "squeeze every hour out of us" their "efficiency" at a high cost in terms of musicians' time and energy. Criticism of the *forfait* and its central role as an employment personnel 'filler' abound in the Dutch press showing support for the following viewpoint:

*"You have a hard core of permanent employees that you can never get rid even if they do not do a lick of work because of the nature of rigidly 'hammered out' CAOs. And you have a large contingent of hard-working self-employed and flex workers who you can dump in the event of a setback. They bear, as it were, the business risk that the company itself no longer wants to bear. If these flex workers lose their work, there is no safety net in place for them."*³³⁰

Interestingly, reports from the Italian musician's union *Sindacato Lavoratori della Comunicazione* (Slc-CGIL) describe present-day discussions regarding National Contracts for all ballet, opera, and symphony orchestras there. "While we currently consider our working time by the number of hours we actually work, we would like to shift to a system in which we consider the number of services as we think this might

³²⁸ Conversations with Mark Gerrits.

³²⁹ The author served as co-chair of the independent committee (vastecommissie Nederlandse Orkesten) responsible to advise concerning a resolution of this dispute.

³³⁰ Teun van de Keuken. "De flexibele schil is het smerigste begrip uit het bedrijfsleven" 14 juni 2020. In the original Dutch: "je hebt een harde kern van vaste medewerkers waar je door dichtgetimmerde cao's nooit vanaf kunt, ook al voeren ze geen lor uit, en een groot contingent keihard werkende zzp'ers en flexwerknemers die je kunt dumpen bij tegenslag. Zij dragen als het ware het bedrijfsrisico dat het bedrijf zelf niet meer wil dragen. Als ze werkloos worden is er nauwelijks een vangnet." (Author's translation)

be a fairer system for our musicians.”³³¹

5.14 The legal relationship between orchestral musicians and management

The number of different answers to what appears to be a simple question never ceases to amaze: the dichotomy between the contractually determined legal relationships and the experiences of musicians from inside the orchestra is substantial. “We often feel that although we hold a contract in our hands, the respect for that contract depends on the whim of board members and management.”³³² The legal relationship between an orchestra and its musicians is based on the overarching concept of employment, which can be defined fundamentally as the exchange of wages for service provided by an individual employee to the employer. The nuances of this definition including a discussion of the concept of subordination will be deliberated upon in the *movement* devoted to freelance musicians and the self-employed.

As the paragraphs below that compare a U.S. orchestra to the general Dutch Collectieve Arbeidsovereenkomst (CAO) will illuminate there are considerable differences in terms of specificity between the two jurisdictions’ approaches to defining employment agreements for orchestral musicians. Furthermore, a number of protections that have been formulated by case law and articulated in statutes in both countries are not written into the texts of CBAs/CAOs.

A comparison of the Dallas Symphony CBA to the NL CAO for the majority of Dutch orchestras uncovers relevant convergences and differences with regard to employment conditions for orchestral musicians.³³³ The recently bargained Dutch orchestral freelance CAO will be analyzed on its own merits in a subsequent *movement*, as there is no parallel CBA for freelancers in U.S. orchestras with the exception of the Associates, substitute players at the premier opera orchestra, the Metropolitan Opera Orchestra (The MET), who work under a special contract that provides pay and benefits almost commensurate to the regular MET scale.

Basically, a CBA specifies wages and basic working conditions, i.e., x dollars per week

³³¹ Report provided by Loris Grossi representative Slc-CGIL Italy in a closed group mail to members of the International Federation of Musicians (FIM) 2019.

³³² Echoed by colleagues on both sides of the Atlantic, this particular quote from Evelien Prakke, assistant principal cello, Het Ballet Orkest (NL) commenting on season planning that derogates from the CAO 2018.

³³³ The Royal Concertgebouw Orchestra (RCO) and the Netherlands Radio Philharmonic Orchestra (RFO) work under other CAOs than the remainder working under the CAO Nederlandse Orkesten.

for y number of weeks for z number of services per week. The number hours-minutes contained within the service unit vary and are specified in the CBA. Most orchestral CBAs include inter alia: audition procedures, benefits such as health insurance and pensions, definitions, and specifications of services (rehearsal/concert length, breaks, scheduling, free days) protection against unfair termination, tour operations and orchestra committee regulations and benefits. By and large, U.S. agreements are massive in terms of length and the degree of detail concerning every aspect on employment whereas to an American eye, the Dutch agreements resemble framework agreements in terms of depth and number of issues that are negotiated and presented. Most Dutch orchestra managers interviewed felt that the “CAO is destroying the orchestra’s future: it is so inflexible that we have real problems meeting the double demand of financing the organization and taking care of our musicians.”³³⁴ Musicians have voiced fears that the ‘so-called inflexibility’ refers to measures that protect their increasingly precarious employment regulations. An example is provided by the ongoing debates in the Netherlands concerning payment for travel time, different categories of rehearsals and the amount of time that should be allotted for management to be permitted to change a rehearsal-performance schedule.

5.14.1 How are collective bargaining agreements negotiated?

In the U.S., federal and state labor laws place limitations on how negotiations for collective bargaining agreements can be conducted. At the core of the collective bargaining process is the concept that a group of employees authorize a labor union to negotiate on their behalf as a group, rather than the employees’ negotiating with the employer as individuals. The theory behind collective bargaining is simple: a group of employees negotiating as a group have more negotiating power with their employer than they would as individuals. Broadly speaking, however, there are different schools of thought about the best way to negotiate such agreements: “the contrast and grey zone between the fist on the table and hold hands and sing one another’s praises.”³³⁵

Regardless of the particular mode of negotiation chosen by the participants, bargaining is conducted between representatives of the union and representatives of the employer. Labor law gives both the union and management complete discretion in the composition of their negotiating teams. In most orchestral negotiations, the union representatives are elected by the orchestra and augmented by at least one member of

³³⁴ Conversations with Piet van Gennip Director Het Ballet Orkest (HBO).

³³⁵ Conversations with Tino Gagliardi.

the local's elected leadership. More often than not, due to the litigious climate of U.S. employment bargaining, the union negotiating team also engages a lawyer or other labor professional to act as lead negotiator and spokesperson. At the bargaining table, the orchestra's management team consists commonly of the orchestra's managing director-CEO, senior staff persons, a representative from the board of directors, and sometimes the head of the Board committee charged with labor relations, who is usually a lawyer specializing in employment and labor law.³³⁶

5.14.2 Can an employer change the CBA conditions based on past practice?

The NLRB has flip-flopped on this issue in the past several years showing a marked politicized trend in which on the one hand, the Democrats support pro-labor agendas while on the other hand, the Republicans are eager to serve the needs of big business and 'the employers.' One year after the Obama NLRB³³⁷ barred employers from changing existing conditions as stipulated in expired CBAs,³³⁸ a Trump appointed Republican-majority Board reinstated support for employers holding that there is no breach of NLRA § 8(a)(5) if an employer's action does not change existing conditions or alter the status quo.³³⁹ In the aforementioned case the Board held that the employer's past practice constitutes a term and condition of employment under two conditions: the employer is permitted to take unilateral action and secondly, the actions do not differ from 'what has been customary in the past.'³⁴⁰ This brings us to a necessary albeit short digression into the interplay of politics and judicial decision-making at the NLRB. Inarguably, the composition of the quasi-judicial five-member NLRB entrusted with interpreting and enforcing the NLRA is of paramount importance for 'setting the tone' for U.S. workers. The Board members are political appointees who serve five-year terms: first the President presents his choice followed by a Senate confirmation process. It does not take a great deal of thought to understand that the President holds incredible powers with regard to national labor laws. Customarily in the bipartisan U.S. tradition, the President will let the 'other' political party pick two members of the Board lending a notion of fairness to the 3-2 majority-opposition split. President Trump did not concede to tradition as all three of his appointees were profoundly

³³⁶ There is no definite rule as to either how many members or the exact composition of the bargaining team as examples from both top-tier and regional U.S. orchestras illustrate.

³³⁷ Refers to the NLRB members appointed by President Obama.

³³⁸ *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016) (*DuPont*). Of special relevance: "in the absence of a CBA, any employer action that involved "discretion" would likewise require bargaining."

³³⁹ *Raytheon Network Centric Systems*, 365 NLRB No. 161 (December 15, 2017).

³⁴⁰ *Ibid.*,

anti-labor, proven by recent NLRB judicial holdings. The impact of this turnabout for orchestral musicians in the U.S. is highlighted by the new Board's penchant for reversing precedent on such issues as the definition of employee vs. independent contractor and the rights of musicians (and of course others) to engage in 'concerted activities' with regard to collective bargaining.³⁴¹

5.14.3 Do orchestral employment contracts contain dispute resolution clauses?

It is paramount to mention the difference between internal grievances that involve individual players and collective concerns. Effective and efficient dispute resolution without resort to industrial actions (and reactions), such as strikes, and lockouts, is a fundamental core value within the field of labor and employment law. Thus, nearly all U.S.-bargained CBAs contain provisions for resolving disputes. The most common dispute resolution procedure within the orchestral sphere is grievance arbitration. An individual musician who has a dispute with regard to actions taken by management or in some cases orchestral colleagues can move forward to initiate a grievance procedure. If the dispute remains unresolved, management or the union can opt for binding arbitration as a means of dispute settlement. In recent years, federal mediation has come to the aid of major orchestral disputes across the United States.

From the annals of U.S. orchestral history, the Goldberg Arbitration, a settlement that took its name from the Secretary of Labor, Arthur J. Goldberg (Secretary of Labor 1961-1962), who served as the chief arbitrator between the MET Association and the musicians represented by Local 802 during the 1961-62 season led to resolution and a slight increase in salary for the musicians. According to press reports, the standoff between musicians and the MET management was particularly hostile and the stage had been set for the season's closing. Even the arbitrator who navigated the dispute with success was taken aback by the magnitude of labor issues that triggered the dispute and vowed to report on "related problems of the future of the performing arts

³⁴¹ *Tobin Center for the Performing Arts*, 365 NLRB 46 (Aug. 23, 2019) denied musicians the right to hand out leaflets protesting Ballet San Antonio's substitution of electronic music for live musical performance. And, crucially turning their attention to the independent-contractor standard in *SuperShuttle DFW, Inc* 16-RC-010963 (Jan. 25, 2019) the Board returned to the notion of 'entrepreneurial opportunity' as a crucial determinant setting aside the Obama Board's adherence to an economic realities test that will be discussed in greater detail in a subsequent *movement*.

in our society.”³⁴² Mr. Goldberg’s brilliant career that took him to the Supreme Court and eventually to the position of U.S. Ambassador to the United Nations precluded his authorizing of that report.

In the Netherlands, grievances are “usually matters that the orchestra-in-question takes care of internally especially if the issue centers on employment-related artistic differences.”³⁴³ Following the formation of the PvFM, orchestral freelancers have joined together in media campaigns to raise political consciousness with regard to the employment challenges faced by freelance orchestral musicians who perform exactly the same work as their employed musician colleagues for much less remuneration. The PvFM, its achievements, and ongoing challenges concerning the goal of equal compensation will be discussed in detail in the pages that follow.

5.14.4 What happens when orchestral contract negotiations break down?

In 2015, of the fourteen ‘large budget’ U.S. orchestras that headed towards CBA expiration dates only four succeeded in reaching agreement.³⁴⁴ In situations in which there is a chance of imminent resolution and/or the existence of good will between parties, the musicians will continue to perform after the CBA lapses as long as negotiations continue: their continuance is known as a ‘play and talk’ agreement. What are the possible scenarios post-breakdown in negotiation?

1. Management provides a declaration that negotiations have reached an impasse. Management then enforces the terms of its most recent offer to the musicians. The union can file an unfair labor practice charge with the NLRB.
2. Lockouts: work stoppages initiated by management in which locked out musicians do not receive benefits or salaries.
3. Strikes: work stoppage initiated by the musicians-employees.

The concept of ‘impasse’ as interpreted by the NLRB has been widely criticized by academics and labor lawyers as well as musicians whose orchestras have gone through protracted ‘impasse’ situations during recent bargaining sagas at the U.S. orchestral workplace. If sufficient good faith efforts are evident yet no agreement has been reached, an employer can declare impasse and implement the last offer presented to the union. Commonly, the union spurred on by employees, opposes management’s offer and/or challenges ‘good faith’ and files an unfair labor practice charge.

³⁴² See, Raymond Ericson. “GOLDBERG TO SCAN ARTS IN U.S. LIFE; Will Discuss Future of the Performing Field When He Decides on Met Issues OPERA PARLEY CLOSES Labor Secretary Says Wide Interest in Case Indicates Need for Broad Review” *New York Times* October 14 1961 p. 25.

³⁴³ Conversations with several Dutch orchestra managers listed in *Recitative: The Interviewed*.

³⁴⁴ “Does your orchestra have an expired Collective Bargaining Agreement?” *Adaptistration* September 15, 2015.

According to the NLRB guidelines, the board “will determine whether true impasse was reached based on the history of negotiations and the understandings of both parties.”³⁴⁵ Thousands of cases from the NLRB’s archives illustrate the delicacy and difficulty to decipher good faith pursuant to employers’ reliance on impasse, which to many legal scholars ‘promotes the inequality of bargaining power.’³⁴⁶ Moreover, and importantly according to practitioners, impasse has reduced the bargaining process to “a list of words and phrases that unions can never use and employers must always use... deadlock,” “bottom line,” “best offer,” and ‘final offer.’³⁴⁷

5.14.5 What happens when U.S. musicians go on strike?

If musicians go on strike after their CBA expires, their action is considered to be a “protected concerted activity,” fully safeguarded under the §7 in the NLRA that upholds the rights of workers to engage in “concerted activities for the purpose of . . . mutual aid or protection.” Although management is barred from firing the striking employees, it is under no obligation to pay the strikers. Consider once again, U.S. orchestras are nonprofits: “one does not need to be cynical, just realistic to figure out that the organization that runs the orchestra will save money when the musicians are out on strike: the halls are dark, no concerts take place unless of course the musicians offer free concerts to the community.”^{348 349}



March 26, 2019
Orchestra Hall,
Chicago, Illinois
during the
orchestra’s longest
strike in 128 years
of performance
history.

³⁴⁵ See the NLRB guidelines available at: <https://www.nlr.gov/rights-we-protect/rights/employer-union-rights-and-obligations>

³⁴⁶ See the considerable academic output written by Ellen Dannin, Clive Gilson, Joseph E. Kolick, Jr. Merle M. DeLancey, Jr., and Michael Yates leading U.S.-based legal scholars who have expounded upon the ‘impasse inequality.’

³⁴⁷ Samuel McKnight. “Impasse Implementation of Final Offers Reviewed by Unionists and Academics” 1997.

³⁴⁸ Discussions with Max Bonecutter bass trombonist Minnesota Orchestra; Metropolitan Opera Orchestra, and graduate of the University of Maine School of Law.

³⁴⁹ See *Epilogue: Appendix 7* for a letter disseminated on March 29, 2019 by the Musicians of the Chicago Symphony to explain reasons for the strike.